

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ADREA, LLC,

Plaintiff,

v.

13 Cv. 4137 (JSR)

BARNES & NOBLE, INC.,
BARNESANDNOBLE.COM LLC, AND
NOOK MEDIA LLC,

Defendants.
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October 22, 2014
9:40 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

PROSKAUER ROSE LLP
Attorneys for Plaintiff
BY: STEVEN M. BAUER
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SUSAN BRACKNEY ARNI
TERI RODRIGUEZ

1 (Trial resumed; jury not present)

2 THE COURT: Good morning. We have an issue that has
3 arisen. Would counsel please come to the side bar, just one
4 counsel.

5 (At the side bar)

6 THE COURT: My courtroom deputy reports that early
7 this morning, when she came in, Juror No. 2 told her that her
8 notes which she had left in the jury room, as all the jurors
9 do, had been ripped out of her notebook and then put back. Do
10 I that I have that right?

11 THE CLERK: Yes, but out of order.

12 THE COURT: Out of order. There are security tapes
13 that show what is going on in this courtroom, so we are
14 checking the tapes to see if anyone entered the courtroom
15 between 6 o'clock last night and 8:30 this morning, when the
16 courtroom was opened for the jurors. I think more likely it is
17 something that happened between the jurors.

18 The question is, what would you like me to do? I
19 think at a minimum we should question Juror No. 2 to find out
20 first-hand exactly what she said and whether it is continuing
21 to bother her or not. It doesn't sound like it is substantive.
22 Depending on what she says, we could question the other jurors.
23 Or we could do nothing. I think at a minimum we should
24 question her just to make sure that she is feeling comfortable
25 and can proceed.

1 Let me hear what you folks think.

2 MR. BAUER: Your Honor, I have never had this issue.
3 I wouldn't know where to begin. I would defer to your
4 judgment.

5 MR. EDERER: Same here. I was wondering if there was
6 any indication that there was any sort of friction between the
7 jurors.

8 THE COURT: That's a possibility. If she is not
9 feeling that, then I don't think we have to worry about the
10 other jurors. Whatever they feel about her, I don't see how it
11 would impact the juror deliberations.

12 What I suggest is that the four of us, namely, the
13 lead lawyers who are here with me at the side bar, my courtroom
14 deputy, the court reporter, and my law clerk, so the five of
15 us -- six of us, whatever.

16 MR. EDERER: You forgot yourself.

17 THE COURT: -- go into the robing room, invite Juror
18 No. 2 in and question her briefly.

19 MR. BAUER: Do you know whether all the jurors are
20 aware of this, or was this a private discussion?

21 THE CLERK: They are aware of it. She does think she
22 has all her notes, going by the order of the witnesses.

23 THE COURT: She can presumably rearrange her notes.
24 Thanks to my promptness or lack thereof, she has had some time.

25 MR. BAUER: She doesn't think they are missing?

1 THE CLERK: Correct.

2 (In the robing room)

3 (Juror No. 2 present)

4 THE COURT: Hi, Juror No. 2. My courtroom deputy
5 reported you had a little incident.

6 JUROR NO. 2: Yes. I came in this morning and went to
7 where I had left my book, and it wasn't there. Somebody
8 pointed out to me that there were some books on the other side.
9 I said, that's odd because I didn't leave one there. I went
10 over there, and it was there. It was sort of between two other
11 books and it was open and all my notes were out.

12 It was like this. Some were upside down, some were
13 this way. They were totally mixed up, the pages. I was sort
14 of in shock. Also, where they were torn out, some of the
15 actual writing was torn but it is not even left here. So that
16 I guess got thrown out.

17 THE COURT: I can see that, looking at it physically.

18 JUROR NO. 2: Some was like this, some was like this,
19 just like that. It upset me. I don't know who has access. By
20 the way, I was the last one to leave last night.

21 THE COURT: And there was no one else there when you
22 came in this morning?

23 JUROR NO. 2: Yes, I'm sorry, there were three or four
24 jurors there when I got in.

25 THE COURT: Anything is possible, I suppose. Let me

1 ask my courtroom deputy, do they clean that room at night?

2 THE CLERK: Yes, they do, when we are lucky.

3 JUROR NO. 2: It's bad. I'm sorry.

4 THE CLERK: The cafeteria does come in just before
5 8:30, sometimes at 8:30. Today he was a little early, whoever
6 brought the breakfast.

7 JUROR NO. 2: He was leaving as I came in, actually.

8 THE COURT: I'm going to guess, but we should probably
9 check, that it may have been one of those people by accident.
10 Maybe the cleaning people thought the case was over or
11 something like that and maybe out of curiosity -- who knows.
12 We will check all that out with our security people.

13 We just want to make sure that you are comfortable now
14 because we are getting close to deliberations. I want to make
15 sure.

16 JUROR NO. 2: I'm fine. I feel a little violated
17 because it is just odd.

18 THE COURT: Of course.

19 JUROR NO. 2: The other jurors were saying, what do
20 you mean you lost your notes? We need your notes.

21 THE COURT: I can see from this distance that you took
22 copious notes.

23 JUROR NO. 2: It helps me.

24 THE COURT: I do want to remind you that if there is
25 anything you don't remember, you can always send us a note, and

1 we will get it for you.

2 JUROR NO. 2: I understand.

3 THE COURT: Thank you very much. That makes us feel
4 much more comfortable. You can go back to the jury room.

5 JUROR NO. 2: Thank you.

6 (Juror No. 2 not present)

7 THE COURT: She seems like a nice woman, she seems
8 comfortable. Obviously, a very strange happening. The more I
9 hear about it, the more I'm inclined to think it was some
10 cleaning person something like that who just got all confused
11 and probably didn't know what to do.

12 In any event, I am inclined to leave her on the jury
13 and let things continue, unless anyone disagrees.

14 MR. EDERER: No, your Honor.

15 MR. BAUER: No objection.

16 THE COURT: Very good. One other thing. I think we
17 will take maybe a 10-minute break between the two summations.
18 I think that's good for the jury not to have them together.

19 MR. BAUER: Your Honor, will you be to give me 10
20 minutes' notice or 5 minutes' notice?

21 THE COURT: Yes, absolutely.

22 (In open court)

23 THE COURT: Let's bring in the jury.

24 (Jury present)

25 THE COURT: Good morning, ladies and gentlemen. I'm

1 looking at my watch. It says exactly 9 o'clock. Does anyone
2 know a good watch repairman?

3 We are about to hear final arguments from counsel.
4 Each side has been allotted one hour. We'll take a very short
5 break between the two closing arguments.

6 I want to caution you that nothing that counsel says
7 is evidence. The evidence which you have now heard came from
8 three sources. There were the witnesses who testified, there
9 were the documents and other exhibits that were received in
10 evidence, and there were a few things that the parties agreed
11 to, stipulated to. Those are the three sources of evidence.

12 Now that all the evidence is in, I think it will be
13 very helpful before you start your deliberations to hear what
14 the attorneys think the evidence shows or fails to show. They
15 are going to, obviously, have very different views. But it
16 will be, I think, useful to you to hear those competing views
17 before you make up your own mind later today.

18 We will begin with plaintiff's counsel.

19 MR. BAUER: Thank you, your Honor. Your Honor, if I
20 could ask for five-minute notice?

21 THE COURT: Yes.

22 MR. BAUER: Well, it's been a long time. You haven't
23 heard a lot from me, but I've been here the whole time, as you
24 know. Good morning, ladies and gentlemen. Thank you for your
25 attention. Thank you for being here. Thank you for your

diligence. When I spoke to you three weeks ago, I told you I hoped that you would find it educational and informative. There has been a lot evidence here.

There is no better way to decide who is right than a jury. There is no better truth-teller than a jury. Nine people like you together collectively know who is telling the truth better than any lie detector, better than any machine, better than anything.

Between the nine of you, you saw all the witnesses. You saw them on cross-examination, that is really the most important thing. We all know on direct they have been prepared by the lawyers, they know what questions are coming, they know what they are going to be asked. But cross-examination, that's when the true test begins because that is when they have to stand up and answer for what they have done.

You heard three weeks of evidence. Obviously, at the very beginning, evidence comes from every direction. There are videotapes, witnesses, and you are hearing all these little snippets of information. It is a jigsaw puzzle. Somebody has dumped the box out and you don't have a picture on the cover, you don't know what these pieces are. That first week for sure you are picking up pieces, and they are white and green and orange. You don't know are these marbles or a city landscape. I am here to help you put the pieces together so you will understand why you heard that evidence.

1 We have some slides, exhibits largely, and the
2 testimony to try and bring things together to help you remember
3 where we are at. Remember, this is a patent infringement case.
4 Some of the things I'm going to tell you is what you saw, but
5 some of the things I'm going to tell you are what you didn't
6 hear, remind you of what you didn't hear.

7 These patents went through the patent office. One
8 thing you didn't hear is any evidence that anything went wrong
9 at the patent office. Nobody from the other side told you that
10 the Patent Office didn't have the information it was supposed
11 to have, that a patent examiner made a mistake, that somebody
12 told the patent examiner something wrong.

13 All the evidence here is that, as the slide tells you,
14 the patent office reviewed these, the requirements of law were
15 complied with, the patent examiner decided that these were
16 valid patents, that they were inventions here, and the patents
17 were granted.

18 When those patents were granted, that's property.
19 This is real property. This is real. As you heard Mr. Barnes
20 talk about it, it's like buying real property. These patents
21 are property that you can then take, you own. What do they
22 protect? They protect ideas. They protect inventions.

23 Where do these patent come from and what is ADREA? We
24 have heard a lot of questions, is ADREA just a company that
25 does lawsuits, things like that.

1 MR. BAUER: ADREA is three of the largest companies
2 that we've heard of, real innovators, people who spend lots and
3 lots of money innovating. They get patents to protect their
4 investment. And when you get a patent to protect your
5 investment, there is no obligation that you make that product
6 for the 20 years that the patents last. The idea of the patent
7 is when you get the patent, when you make the investment and
8 you have identified an invention, you can make it or you can
9 license it; but the real thing is when people use that
10 technology years later.

11 Remember all innovation is standing on the shoulders
12 of the people who came before you. Every invention you have
13 ever heard of was an improvement on something else. We hear
14 about airplanes and the Wright brothers, well, that was
15 improvement on a glider. Thomas Edison's light bulb, he didn't
16 invent the light bulb; he came up with a better filament to
17 make the light bulb last longer. And all inventions are slight
18 improvements, to some extent, over what was there before. When
19 you see the prior art that they put in front of you, every one
20 of those, you see what it was like years before and you see
21 that these patents are steps forward. And that's what we have
22 got patents on, the steps forward, the improvements.

23 Now, it's not just these big technology companies.
24 These are real people. And you saw the real inventors. And
25 not only did you see real inventors, Mr. Shteyn, you saw the

1 mind of a real inventor when he was up there. If you remember,
2 this goes way back the first few witnesses, and the dialogue,
3 the colloquy between him and opposing counsel, Barnes & Noble
4 counsel, you see how an inventor thinks. When asked what can
5 you do with a garbage can, it was a little bit silly, but
6 that's what an inventor does. He thinks of different things
7 you can do in different ways.

8 And you have two inventors here, prolific inventors:
9 Mr. Hendricks with 60 issued patents, 90 patent applications,
10 Mr. Shteyn, 29 issued patents and 40-something patent
11 applications. These are real inventors and real people that
12 did real things 10 and 15 years ago. 14 years ago he did his
13 one-button thing. And Hendricks, 20 years ago, 1994, the first
14 e-book.

15 And they told you what their inventions were. And
16 Mr. Hendricks has been incredibly successful, right? He moved
17 up. He is retired right now, but he is the founder of
18 Discovery Channel. And he told you, what did he invent? The
19 first time being able to deliver content on demand in the form
20 of a full book.

21 And they didn't show you anyone who had that before
22 1994. The best they showed you was something where you had to
23 go to the bookstore with a cartridge and download the book on
24 to the cartridge and then go home and plug it in. Well, that
25 might have been cool then, but he, a few years later, went the

1 next step. It was all integrated. It was together. And it
2 wasn't just the cartridges there, but it was the whole system
3 and we will see those patents.

4 What did he say was novel about his application was
5 the first time that someone had invented the process of
6 actually holding a book-type device for the reading of a book
7 for sale. And the Patent Office granted that patent.

8 What did Mr. Shteyn tell you about his invention? The
9 idea was really simple. By the way, simple invention is the
10 best invention. That's the real invention. Because ask
11 yourself: If it was so obvious, why wasn't this stuff being
12 done before? And when you're looking at real innovative
13 companies like these companies and they come in and tell you
14 anybody could have done this and it was obvious, why hadn't it
15 been done? The idea was simple, you just press one button.
16 You press a button and get the information. You press a
17 button. You initiate the retrieval of information by pressing
18 a button and, boom, you get what you want.

19 Really simple.

20 Now, we talked about the three companies -- Discovery,
21 Sony, Philips -- they put in hundreds of patents into this
22 joint venture. And they get together and they put their
23 patents in and they say, we need somebody with some real
24 experience in devices. And they go to Intertrust. And you
25 heard Dr. Shamon, our first witness -- barely remember him

1 that far back. And he told you ADREA's business plan. These
2 companies got together and ADREA's business plan was to license
3 the patent portfolio and eventually bring in technology
4 components to help people that are operating in the e-book
5 market.

6 That was their business. They didn't put all things
7 in just to sue people. In fact this is the first lawsuit ADREA
8 has brought. Remember the first lawsuit, the Amazon suit was
9 between Discovery and Amazon, a private battle between
10 Discovery and Amazon. It was only when ADREA was formed and
11 Mr. Shamoon came in that that case, the Amazon case got
12 settled. And then what do you do after you settle, after you
13 license your technology to the largest person out there? You
14 talk about licensing it to the next largest person, in fact,
15 the only other large company out there.

16 Remember Intertrust. What was Mr. Shamoon's
17 experience coming into this? The company he headed had made
18 over a billion -- and that's not a typo -- a billion dollars
19 from licensing patents over the last 12 or 15 years. This is a
20 man who knew how to license patents. And he came in and he
21 settled that Amazon case for \$12 and 1/2 million. How many
22 companies have they ever sued? Only Barnes & Noble.

23 Now, I know one thing I have to tell you, I don't
24 expect to get back up here again. I get my hour with you and I
25 sit down. Barnes & Noble counsel lets the last word,

1 typically. So I don't know everything he is going to say and I
2 need to anticipate a little bit from the way the evidence has
3 gone in, but one thing we know from the opening, he is going to
4 talk about Barnes & Noble, about ADREA being a company that
5 sues people. When you go and you discuss licensing with
6 someone and they say no, we are not going to pay you anything,
7 you only have two options, in the U.S. at least. You have to
8 walk away and say, all right, they don't want to pay me. Well,
9 that's pretty good negotiating from Barnes & Noble's viewpoint
10 or you have to come to court. And that's why we are here.

11 You have heard so much about the Amazon agreement. I
12 am not going to spend that much more time. Just remember what
13 Mr. Barnes said, and it will come back up when I talk about
14 damages again and we will have his actual testimony.
15 Mr. Barnes' single, best, most reliable measure of what these
16 patents are worth that he saw, \$12-1/2 million.

17 Now, we want to talk a little bit about how did we get
18 here and why did we get here because they are going to make big
19 deal about us suing them. By the way, monetizing is not a bad
20 word. Monetizing is the word they like. Maybe they think it
21 means something. Monetizing is getting paid for what you own.
22 Monetizing, you own an apartment and you rent it, that's
23 monetizing, right? You rent an apartment. If you grow food
24 and you sell it, that's monetizing. This is a different
25 industry. You make inventions, you patent them, that's your

1 property. It's as if you own just empty property and you build
2 a house on it. If it's empty property, it's got a certain
3 value. You build a house on it and you rent it, it's worth
4 something else. In technology you make an invention you just
5 sell it, it's worth something. You patent it, it's worth
6 something else.

7 This is Exhibit DTX 115.

8 I will put up the exhibits as we go through this.
9 There will be the numbers if you want to write the exhibits
10 down. I think you know, you are going to get all of the
11 exhibits back in the jury room. And you are going to get a
12 lot, and you haven't gotten to hold them yet or see them, and I
13 encourage you to take them out and look at them and see what is
14 there.

15 But DTX 115 was an e-mail from Mr. Shamoon to
16 Mr. Hendricks after they had settled the Amazon agreement where
17 he writes to Mr. Hendricks and says, "We would not be where we
18 are today without your valuable portfolio. The win against
19 Amazon is a starting point to what we hope is a healthy and a
20 creative licensing program."

21 Nothing wrong. That's what the business is.

22 What was the beginning of that healthy licensing
23 program for ADREA, having settled out with Amazon?

24 DX 115 was December 23, 2011, sort of on Christmas
25 Eve. What was he talking about the licensing program? This is

1 PTX 120, an e-mail between Barnes & Noble and ADREA. They
2 began talking. This is the problem. This is what brings us to
3 the court. What does Barnes & Noble say when these discussions
4 began?

5 I paraphrase. Sorry, we are busy. Mr. Snowe, the
6 lawyer is busy. As general counsel, I don't know what -- it
7 says up at the top he is in legal. But the person writing
8 this: As general counsel, so am I. If you have a proposal and
9 any specific claimed reason why we need to license your
10 patents, include a claim chart, send them to us, and we will
11 review it. If you don't like that, I guess that's the best we
12 are going to do.

13 All right. That's OK. That's fair. Somebody has
14 knocked on Barnes & Noble's door and said, we have these
15 patents we would like to license. And ADREA responded. And
16 this is JTX 21. And this is from Mr. Ambwani back to Mr. Snowe
17 about three months later and responded: I hope you're well.
18 Per your request when we last communicated, we have prepared
19 sample claim illustrations regarding the portfolio and your
20 devices. I hope these claim maps demonstrate that Barnes &
21 Noble will benefit from taking a license. Then it talks
22 further down about ADREA having settled the litigation with
23 Amazon.

24 You will see Joint Exhibit 22, and that's the document
25 that was sent, a detailed analysis. It really lays out the

1 patent infringement claim that you have seen here. There were
2 no secrets here. They were told exactly why they infringed in
3 great detail. And you can see the claim element, the three
4 patents that are in suit here. They were given this
5 information.

6 And DTX 55, about two months later, May 14, Jeff
7 McDow, another ADREA employee, writes to Bill Baker who is one
8 of Barnes & Noble's lawyers: "As we have discussed, I've
9 attached a licensing proposal. As I indicated on the phone, we
10 are open to a variety of licensing modes and can be creative
11 about finding ways to work together, so the attached proposal
12 is simply one way it can be structured."

13 And you saw that proposal, JTX 31. They offered to
14 license Barnes & Noble 50 cents per licensed reader.

15 Now, what is important about that is we are not in a
16 flea market here where nobody knows the value. It's not a flea
17 market where somebody starts out saying I want a thousand bucks
18 for this and it's ten cents and you go back and forth, some
19 huge range. These are business people.

20 Go look at that 50 cents per licensed reader and
21 compare it to what the price was that Amazon had paid. Amazon
22 had paid \$12 million. You have seen in the record the
23 evidence, the number of units Amazon had sold up until that
24 date. Do that calculation. See how much Amazon had paid up
25 until then and see if it's not in the reasonable ballpark of 50

1 cents.

2 Now, I know that they say, oh, but that was the
3 opening offer, 50 cents, you always want less. Well, that was
4 an opening offer to avoid litigation. And there is one thing
5 that there is no dispute here, none, and Mr. Barnes told you
6 this yesterday, you take out of play the risk when you decide
7 how much money is on the line. That hypothetical negotiation,
8 the patents are valid and infringed, there is no risk in that.
9 So that 50 cents offer is a risk avoidance number. That's the
10 floor here because if the patents were valid and the patents
11 were infringed, there wouldn't be much negotiating, certainly
12 not down from that number.

13 And with that offer on the table -- and this tells us
14 why we are here -- that offer is on the table, Barnes & Noble
15 offered nothing, nothing.

16 Now, you're going to get a whole bunch of jury
17 instructions from the judge when we are both done. Both
18 counsel, we have seen them. We know what the judge is going to
19 tell you. We are allowed to preview it a little bit. And
20 you're going to see one instruction on willful infringement and
21 it's going to tell you that to prove willful infringement, we
22 must prove by clear and convincing evidence that Barnes &
23 Noble, once they were put on notice of ADREA's patents,
24 recklessly disregarded the fact that their actions constituted
25 an unjustifiably high risk of infringement of that patent.

1 And to determine whether defendants' infringement was
2 willful, you should consider all relevant facts to the extent
3 they are supported by credible evidence including, for
4 example -- and I have just pulled out the one that we think is
5 the primary example -- whether or not defendants made a good
6 faith effort to avoid infringing the asserted claims.

7 And what do we know about the good faith effort Barnes
8 & Noble made? Mr. Mulchandani testified in deposition as a
9 company representative. And when he was here, we put in his
10 deposition testimony and it's a corporate admission. And he
11 was asked on behalf of Barnes & Noble -- so when it's "you," he
12 is answering for Barnes & Noble, not personally: "Are you
13 aware of any attempts by Barnes & Noble to design around or
14 avoid infringement of the patents that are at issue in this
15 litigation?"

16 Answer: "No."

17 What is the evidence whether or not defendants made a
18 good faith effort to avoid infringing the asserted claim?

19 I submit, ladies and gentlemen, it's clear and
20 convincing, they didn't.

21 Now, let me go to the merits, the technical merits of
22 the case because that's why we are here.

23 Three patents.

24 Now, I am down to 45 minutes. I am not even going to
25 take that full time doing this. I am left with the task of

1 summarizing for you in 30 minutes three weeks of technical
2 testimony that had to sound an awful lot like a Martian --
3 certainly the first couple of days when you were watching those
4 videos and you didn't have any idea why this was going on. It
5 hadn't gotten to patents yet. So let me help a little bit to
6 bring all that evidence together.

7 Let me start with this e-book lending patent. It's
8 Mr. Hendricks' patent. The 1994 filing date, even though there
9 is some earlier stuff, the parties agree that this patent is
10 entitled to 1994. What did the abstract tell you about this
11 invention? This is JTX 2.

12 By the way, these patents, we have seen the original
13 patents. I don't know if you're going to actually get the
14 originals with the gold seals or not, but you're going to get
15 JTX 1, 2 and 3, the patents.

16 On the first page of that patent, the invention and
17 electronic book selection and delivery system is a new way to
18 distribute books and other textual information to book stores,
19 libraries and consumers.

20 Now, that's not the claim. In fact this patent, JTX
21 2, is a thick patent. But the reason I point that out is,
22 patents can have multiple inventions. So if you look under the
23 that related U.S. application, you will see this one patent
24 application resulted in the '927 patent, the '690 patent and
25 this '501 patent. So that's why we look at the claims.

1 Different inventions come out of these different patents.

2 But what does the patent describe? And you saw his
3 testimony I put up a minute ago. The first complete electronic
4 book, and this is what he was thinking about. And within the
5 body of that, what does he show and tell you? In column 11?
6 All the patents you have probably seen by now, they have the
7 numbers on the top which are the column numbers. 11 brings you
8 to the column and then there are line numbers down the middle
9 if you want to see the exact cite.

10 What does it tell you? He is talking about e-lending.
11 It's one of the inventions in the e-book system, just one of
12 them. The software can be configured to allow the book to be
13 read during a period of time, i.e., two weeks, and then
14 automatically erased.

15 So he is thinking all the details of e-books, right,
16 not just the book itself? What can you do with the book? This
17 is a guy who is sitting there coming up with ideas on what does
18 the world need? And one of the ideas is e-book lending.

19 Here are two more instructions you are going to get
20 which you need to understand the infringement.

21 To determine whether the Nook device literally
22 infringes, you must compare the Nook device to the elements of
23 the claim. I think you all understand that. If the Nook
24 device duplicates every element of the claim, then it literally
25 infringes that claim. The statement is true even if the Nook

1 device includes other elements. I emphasize that last sentence
2 because almost all of the arguments that they are making about
3 noninfringement are talking about other things, and we will
4 talk about the claim itself. But when they talk about how it
5 works on the Web site, it's just not about the claim. They are
6 distracting you from the claim. The claim is the only thing
7 here that defines the invention. It's the claim that defines
8 the invention.

9 And the burden of proof for infringement -- and I flag
10 it right now and I will talk about -- there are two burdens of
11 proof in this case. There is the burden of proof for
12 infringement which we call the preponderance of the evidence.
13 And there is the burden of proof for invalidity. I have the
14 burden, ADREA has the burden of proving infringement.

15 We need to prove infringement by a preponderance of
16 the evidence. And it's defined, preponderance of the evidence,
17 preponderance of the credible evidence; the credible evidence
18 being such testimony, exhibits or other evidence that you find
19 worthy of belief. To establish a claim by a preponderance of
20 the credible evidence means to prove that claim is more likely
21 than not true.

22 That's our burden in this case. If you use it as a
23 football analogy, I just have to get the football over the
24 50-yard line one inch. If it's more on my side than their
25 side, we have proven infringement. That's distinguished from

1 the burden they have for invalidity, and I will read it when I
2 put it up there, but they have the burden of clear and
3 convincing evidence, a higher standard. So our burden is to
4 prove infringement by a preponderance of the evidence.

5 Let me talk about the '501.

6 Now, this one was sort of easy for us, I think,
7 because they don't take issue with any of the ones up there,
8 any of those elements that we have the green check mark up
9 here, they don't take issue with here. In fact Mr. Neuman said
10 that: "Isn't it correct that the only element of claim 18
11 which you take issue for purpose of infringement is the
12 associating step?"

13 And he answered: "It is correct that that's the only
14 one which I have taken issue and presented today."

15 So that's the only one I am going to address. We have
16 put in evidence for every step, and I need to say that because
17 there is a gotcha here. Even if he tells you he is not taking
18 issue with it, if we didn't put evidence in, they would get up
19 there and say, gotcha, you didn't prove something, because it's
20 my burden to prove.

21 And I hope your notes reflect the testimony and the
22 evidence that every element is in fact there, but I am only
23 going to address the one element that I know that they are
24 going to get up and tell you is not there, the associating
25 step.

1 So that associating step comes with a court claim
2 construction. The judge is going to tell you, and it will be
3 in the instructions what that term means. And it means
4 associating with the electronic book a predetermined amount of
5 time that begins when the electronic book is stored on the
6 viewer.

7 So the predetermined amount of time is easy. We know
8 that that's 14 days.

9 And when does it begin? Well, first, let me, by the
10 way, point out the top piece here from PTX 19, lending e-books
11 the first sentence there: "With Lend Me technology from Barnes
12 & Noble, you can now share e-books from Nook to Nook." Our
13 allegations are about the infringement, the loaning of books
14 Nook to Nook.

15 The next sentence, it doesn't stop there: "You can
16 lend to and from any device with the Barnes & Noble e-reader,
17 including iPhones, BlackBerrys and most Windows and Mac laptops
18 and desktop computers." We don't charge those with
19 infringement in this case.

20 I think an awful lot -- I think you will remember, an
21 awful lot of the evidence here, is them talking about Web sites
22 and apps and does it work on a Web site and what happens when
23 you accept on the Web site and it takes time. Those aren't
24 accused products. We are only talking about the Nook to Nook.

25 With regard to the Nook to Nook, I think that you will

1 see the only evidence that they are presenting on that are
2 things like what if the computer network crashes, then it might
3 take a little longer. What if you don't turn it on? What if
4 you break it? Then your time period is running.

5 Well, I don't know whether if you break it that counts
6 as an infringement or not. We are talking about the normal
7 everyday operation of a Nook to Nook device. And what did we
8 see? You saw the testimony. The everyday normal operation,
9 you push accept and when you push accept, the book comes. When
10 you push accept, it's there. And when you push accept, the
11 time period is put on it. And that's what the testimony is.

12 When does the loan period begin? When the book is
13 downloaded to the viewer. There is a single operation. Nook
14 to Nook, single operation. You push the button and the book
15 shows up.

16 Their expert, Mr. Neuman, it happens automatically.

17 What is the defense here? Their defense is, because
18 it is computer software and computer software runs
19 sequentially, that they put the time period on it in the cloud
20 before it's actually downloaded. But it's happening when you
21 download it, when you store it. Within a second or two or
22 four, when you're ready to download and when it's being
23 downloaded and when it's being stored, the time period begins.
24 And the fact that it takes place one step in the computer code
25 is just not relevant to when it's being stored.

1 And Mr. Berg showed you exactly that. He gave you an
2 exact demonstration. The whole process takes on the order of
3 two to four seconds. That is just a still from his video. You
4 push the button and in a blink of the eye the book was there
5 and it was stored on the video. And the time period was
6 affixed, and that time was associated with when you did it.

7 The testimony about how software works, Mr. Berg is
8 talking about computer software runs sequentially. It might be
9 toward the beginning, the middle, the end, but it has to be
10 series of steps. It happens when you download, when you store
11 it. It's all part of the same process when they infringe.

12 Keep this in mind. Whether it happened first or
13 second within those two seconds isn't part of the invention
14 itself. That wasn't the invention. It wasn't that Mr.
15 Hendricks said, my invention is doing it after instead of
16 before. There is no prior art saying people used to do it this
17 way and your invention is doing it that way. His invention was
18 getting the book downloaded and putting 14 days on it. That
19 was what the invention was about, and that's what the claim
20 says. When you're in software, you don't get around it by
21 tweaking it, and that element is there.

22 But just in case you want to be hyperliteral about
23 that and buy into the software order, there is this doctrine of
24 equivalents. It's a legal doctrine created for these types of
25 circumstances.

1 And you're going to get this instruction from the
2 Court: Even if the Nook device do not literally infringe a
3 particular element, even if you think there is something there
4 with their argument, there is still infringement Nook device
5 meets that element under the doctrine of equivalents. This can
6 happen if the product contains an element that you determine is
7 equivalent to the element of the patent claim, equivalent in
8 the sense that any differences are insubstantial.

9 Well, this one is easy. Both experts said that.

10 Mr. Berg asked: Would that interval be a substantial
11 difference from what the claim 7 requires?

12 No, it would not.

13 Then he goes on and says: You're talking about a
14 couple of seconds, and over that 14-day period, .003 percent.

15 And Mr. Neuman, their expert -- can't get better than
16 having their expert say it: "Is it your opinion that a few
17 seconds constitutes a substantial difference of the lending
18 period?"

19 His answer: "It does not constitute a substantial
20 difference in the life of the period."

21 There is no substantial difference by doing the step a
22 few computer steps before or after.

23 That claim is infringed.

24 We have proven more likely than not that it's
25 infringed at least if you're not convinced.

1 Now, there's two claims that we assert in this patent.
2 There is claim 7. I don't need to spend any time on that.
3 Look at the language in claim 7. The elements are word for
4 word the same as claim 18.

5 The difference, one of the things patent lawyers do,
6 you try different words to try to capture the invention a few
7 different ways. One of the things you do, claim 18 is a
8 device. It's a portable viewer for displaying books. Claim 7
9 is the method of restricting access to electronic books. So
10 one is a process, one is a product. The language is exactly
11 the same. The only issue they took, Mr. Neuman presented in
12 his direct was that same associating step. If you find claim
13 18 is infringed, claim 7 is infringed.

14 Now, there was just one thing. You remember Mr.
15 Neuman -- I am just getting time checks because I have so much
16 to do here -- he took no issue in direct. I would just move
17 on, but on cross-examination you may remember, he popped up and
18 said, I have a couple of new opinions that I hadn't had in my
19 report and that came up on cross. I have no idea whether they
20 are going to press those issues now. They didn't in direct.
21 But just in case, let me just address what was his view. He
22 said, Barnes & Noble is not doing this, the Nook is doing this.
23 That was his answer, that these steps are not being done by
24 Barnes & Noble, they are being done by the Barnes & Noble Nook.
25 Well, he was off the reservation in that testimony.

1 Mr. Mulchandani testified that the Nook device and the
2 Barnes & Noble cloud -- he was asked do they coordinate with
3 one another? And his answer was no, the cloud is the sole
4 governing.

5 As I mentioned, the device is effectively a servant in
6 that process. It's Barnes & Noble that is performing those
7 steps. He didn't talk about it in his direct. All the
8 elements are there and there is infringement.

9 Now, patent validity, let me just talk about the
10 instructions on that because they are a little bit different.

11 For the '501, the issue is novelty and there is going
12 to be obviousness for a couple of them. Those are the two
13 validity defenses that they are presenting, novelty and
14 obviousness.

15 Novelty. They need to prove to you by clear and
16 convincing evidence that each and every element of the claim
17 was either inherent or expressly disclosed in a single prior
18 art reference. Single. They have to look at one patent that
19 they say was done before and show you every element was there.

20 And there is the presumption of validity for validity
21 issues. The fact that the patents were approved by the U.S.
22 Patent Office makes the asserted claims presumptively valid.
23 But of course they can still prove that the patent office made
24 a mistake by proving that it is highly probable that the claims
25 in question are invalid, and that's standard. Invalidity by

1 clear and convincing evidence, that is, by proving it is highly
2 probable. And what is clear and convincing evidence? The
3 proof that establishes in your mind that the proposition at
4 issue is highly probable.

5 Can they prove with Mr. Neuman's testimony that the
6 Saigh reference has all the elements of the '501 patent? Well,
7 the testimony was that it doesn't store an electronic book on
8 the viewer and it doesn't associate a predetermined amount of
9 time after the book is stored on the viewer.

10 Now, there was a little dialogue with Mr. Neuman
11 whether the Patent Office had considered Saigh. He said it was
12 on this long list. Well, it's more than on a long list. It's
13 on a list that examiners' initials are on that list. It's not
14 just something there, examiners' initials.

15 And if you look at the very little -- I don't know how
16 well it blows up. This is JTX 5, the patent file history.
17 It's a couple thousand pages. If you're interested the page is
18 58798. On the bottom what is highlighted there, and I will
19 read it, and this is a note to examiner: "Examiner, initial if
20 reference considered whether or not citation is in conformance
21 with" -- and then there is a rule, MPEP609 -- "initial if
22 reference is considered." The examiner initialed it. It was
23 considered. And the patent is presumed valid. They need now
24 to come in and tell you why this has all the elements.

25 What were the differences? One thing I think they

1 were trying to say is this whole figure is an e-book. And from
2 a distance when you sit here and you don't read the patent,
3 well, that looks like a book, doesn't it? Is that an e-book?

4 You know what this is? The thing on the right is a
5 pad. This is a portfolio. There is a zipper around it. This
6 is like a Day-Timer. There is a pad.

7 There's headphones, a storage box here in the middle.

8 That is what this is. It's not an e-book.

9 The controller is the little electronic thing on the
10 top.

11 And the memory, where the book is, are these other
12 boxes separate programmable memory modules, 22, and the
13 cylinder is 24 further down.

14 And this is what invention is. When was this patent?
15 Saigh was 1991, three years before Hendricks did this, three
16 years before. It's the closest thing they say to what was out
17 there -- the closest thing, three years before.

18 Hendricks made an invention. What was there before
19 were separate. You went to the bookstore. You downloaded it.
20 When you downloaded it on the memory module, the clock began
21 running. Then you would go home. You would plug it in. You
22 would read. Not what the claims requires. The claim requires
23 storing it on the book. The time begins to run when you store
24 it on the book.

25 Saigh is different. And you heard the witnesses, even

1 Mr. Neuman said, it's referring to memory module. That is
2 separate. They are different. There is no clear and
3 convincing evidence here that they are the same.

4 This is the verdict form you're going to see. So
5 you're going to be asked to answer these questions.

6 There is one thing I always remind juries. The
7 questions are reverse for validity infringement. So for
8 liability for infringement, have we proven, the answer is yes.
9 For validity have they proven, the answer is no. So if you're
10 in favor of ADREA, please don't check yes right down the line.
11 You need to say yes for infringement, we have proven it. Have
12 they proven invalidity? No.

13 Let me talk about the '851 patent. This also is
14 another Hendricks patent. This one, as you know, is more about
15 the encryption side of the e-book as opposed to the lending
16 side.

17 Two general issues that they raised that I will focus
18 on, again, I believe we have proven every element is here, but
19 these are the two: Selecting a title from the transmitted list
20 and there was some discussion about the type of encryption
21 information.

22 Selecting a title. Remember what we are talking about
23 here. We are talking about -- it's in the preamble -- an
24 electronic book viewer. These are the steps that an electronic
25 book viewer is meant to perform, not the steps you, the user,

1 performs.

2 Counsel for both sides are talking at cross-purposes.
3 What title? They are talking about the titles on the book, the
4 name of the book. We are talking about the code in the device.

5 The Court's construction is: Is the actual title a
6 sign or any other designation or icon indicating a particular
7 group?

8 The EAN is a title when you're talking about the
9 machine. And it's the receiver that picks that EAN out of that
10 list after the user says what book is it I want.

11 Now, they have some other places. They say, well,
12 sometimes we have a button and there is only one EAN there.
13 But we are talking about the ordinary usage of this, not
14 sometimes, the normal usage.

15 And they don't dispute that -- this is Mr. Neuman --
16 don't disagree that when a user purchases a book, the devices
17 send a request containing the EAN. That element is there. The
18 book has to pick it from the title.

19 By the way, keep it in context for the claim. The
20 receiver receives a transmitted list of titles -- this is just
21 normal English as you read it -- it receives the list, it
22 selects the title from the transmitted list, it communicates
23 that title back and then the book shows up. That's what we are
24 talking about, not what the person does at home.

25 The last element, the transmitter. They took issue on

1 the transmitter about how do you read encryption. And Mr.
2 Neuman said that an engineer wouldn't understand what
3 encryption meant or wouldn't read it the same way.

4 You will get an instruction from the judge, the claims
5 contain ordinary English words and specialized terms. One of
6 my jobs is to determine the meaning of specialized terms, and
7 the judge has. The terms he has interpreted, ordinary English
8 terms.

9 How do you read this claim? Encryption of information
10 shows up in (a4). It talks about the receiver receives
11 encryption information. The memory receives the encryption
12 information. The processor coupled to the memory processes the
13 encryption information. Those are referring to the (a4)
14 encryption.

15 (d) A transmitter coupled with a processor that sends
16 encryption. Different encryption. When you talk about the one
17 before, you use the word "the." (d) says "encryption." Then
18 it says: "Wherein the encryption information of (d) includes
19 other information." It's plain ordinary English.

20 Mr. Berg told you what the two different types of
21 encryption information are. In one the encryption information
22 is the pre-master secret. And in the other, that's part of the
23 license that gets received. Different types, plain language of
24 the claim. That claim is infringed. The patent is not
25 invalid.

1 Obviousness. This is the first time you will see
2 obviousness. They agree that the prior art references -- well,
3 by doing obviousness, it means the prior art references don't
4 have everything. So they are telling you here, they don't have
5 a prior art reference that includes all the steps. Now they
6 have to get you to say, it would have been obvious.

7 What does it mean that a person skilled in the
8 relevant field would have thought it was obvious?

9 Well, what is out there is different. It works
10 different. That's why they are trying to prove it's obvious.
11 It works differently. They want to combine it with an
12 encryption standard. Nobody explained why it would be obvious.
13 I think the witness basically just said, I don't think it was
14 obvious. Did he convince you clearly and convincingly that
15 this would have been obvious to a person of ordinary skill at
16 the time?

17 Let me move on to the '703 patent. This is the one
18 that came from Philips and Mr. Shteyn. A consumer apparatus,
19 as he described it in his abstract, is made an intuitive
20 component of user interface to a topical server.

21 The idea is, it's simple. You want to make the
22 interface of the device as simple for people to use. And he
23 compares it to the Web browser. And he says, mine is simpler,
24 you just push the button, basically was his testimony.

25 And his patent taught because he was thinking about

1 things at home. Remember, the e-book reader is a consumer
2 appliance within these definitions, right? I know there was
3 some examples of blenders and garbage cans and other things,
4 but we are not equating a garbage can to an e-book reader, but
5 this patent is broader than just garbage cans. He actually had
6 a discussion. He was actually even thinking about a bookcase
7 with a URL associated with books, books in quotes. He was
8 talking about e-books. He told you.

9 What is the one element they tell you is missing on
10 this one or the one element I think they focused on, on this
11 one? Again, when the consumer appliances does not require user
12 to access a Web browser or other device in order for the
13 appliance to initiate retrieval.

14 Every time they talk about whether the shop is a Web
15 browser, it's misdirection. It doesn't matter whether the shop
16 application is a Web browser. It is not and it doesn't matter.
17 Because what does the claim -- let me just put the claim in
18 context. It is a input component responsive to a user input
19 for initiating retrieval. That's the first element, right? An
20 input component responsive to user input.

21 The element says, where the consumer appliance does
22 not require a user to access a Web browser or other device in
23 order for the consumer appliance to initiate retrieval. You
24 can initiate retrieval without having to go to a Web browser or
25 other device. And with the Nook, you initiate retrieval before

1 you get to the shop application. This is the button to get you
2 to the shop application.

3 And the witnesses told you that. This is Mr. Neuman,
4 their expert: Pressing the shop button does initiate that
5 process in the context of claim 1. It's pressing the button
6 that initiates the process.

7 And Mr. Berg: All you do is press the button and the
8 information is retrieved.

9 That's what the claim requires, initiating retrieval
10 without going to the shop application or the Web browser first.

11 This claim is literally infringed.

12 Now, they spend so much time on the Web browser and I
13 don't get to come up again. I just have to make one point.

14 A Web browser is software. It's the thing that allows
15 you to browse the Web. It's the thing that you put your
16 address in and allows you to go anywhere. That's your Web
17 browser. Google Chrome, Internet Explorer -- that's a Web
18 browser. Their argument about what a Web browser is, they are
19 using the word browse as in read. The guy says, well, when I
20 am at the shop, I am browsing the page. They are talking about
21 what the person does. That's what they said. When I am on
22 that shop page, I'm browsing. Well, that's what the human
23 does. We are talking about software. Web browser is what
24 takes you through.

25 How do we know, by the way, that that shop isn't a Web

1 browser? This is one of those things when Mr. Narain was on
2 the video, you just wouldn't have heard. It was an hour
3 videotape. Do you know what he said during that videotape?

4 "Is it correct that the Nook Simple Touch with
5 GlowLight does not have a Web browser?"

6 And his answer is "yes."

7 And we show you the Nook Simple Touch GlowLight. It
8 doesn't have a Web browser, but it has the shop. He is their
9 engineer. He knows there is no Web browser there. It doesn't
10 matter. Every time you talk about the Web browser, it doesn't
11 matter in the claim.

12 Shteyn tells you a Web browser is the thing with the
13 address.

14 Claim 13 is similar. The focus is enabling the user
15 by a single user input. Remember we said we write claims to be
16 a little different. This one doesn't talk about the Web
17 browser at all, claim 13. This simply says, all you have to
18 have is the single user input. It doesn't even mention Web
19 browser. That element is there.

20 You know what their argument was? I got to turn the
21 box on, the thing on. I have to push a power button.

22 Well, that's not what this claim is about. Method of
23 enabling a service provider to provide service to the Internet,
24 it's not: Gee, I have to turn it on, that's my first step and
25 then I push the button. Or they talk about the registration

1 process. That's the thing you do the day you buy it and you
2 take it out of the box. That's their argument. I take it out
3 of the box, I have to plug in, I have to do a punch of stuff on
4 Day 1. That's not what we are talking about. We are talking
5 about normal usage of a machine that is on, not a machine that
6 is off. A machine that is on, you push the button and you go
7 to the shop application.

8 Let me just move on.

9 The validity issue, they talk about Munyan, not
10 obvious.

11 What is the difference with these, by the way? Munyan
12 is talking about a security code. Remember the claim talked
13 about a code that is associated with the device, right, an
14 identifier associated with the consumer appliance?

15 Munyan is not a code associated -- it's a security
16 code. It's something that doesn't help bring information back.
17 It gets you in, but we are talking about a code that gets the
18 right contextual information downloaded, not what gets you in.

19 I am told that my time is running out.

20 THE COURT: You asked for five minutes. Actually, you
21 have a full seven minutes left.

22 MR. BAUER: Thank you, your Honor.

23 Mr. Cabral is giving me my two-minute notice of your
24 five minutes.

25 Let me just mention on Bolas, Bolas is a radio. It's

1 not downloading information about a radio. It's downloading
2 music. This claim is about bringing in information about the
3 device, not for the device. Again, there's differences. You
4 have heard the experts.

5 This is what I wanted to spend my last seven minutes
6 about.

7 This is why we are here. We own these patents. There
8 is infringement. They are valid. ADREA is entitled to fair
9 compensation.

10 And this is the instruction: "In order to reasonably
11 compensate plaintiff for its losses. Damages. The amount of
12 money that defendants hypothetically would have paid ADREA as a
13 fee or royalty for using the patented invention."

14 Going back to 2009, if we had had this discussion,
15 what would it have resulted in, because that's our damage. If
16 they had paid us when they should have, when they introduced
17 this in 2009, how much would that negotiation have resulted in?

18 Remember, what are the facts in 2009? Kindle has been
19 on the market for two years. These are the facts. Amazon is
20 taking book sales from Barnes & Noble, which is a bookseller.
21 Barnes & Noble has hired engineers. They are developing a new
22 product to take on Amazon. And this is all ten years after
23 these patents, ten years after the invention.

24 Nobody told you Barnes & Noble hired engineers and put
25 them into a locked room and said, do this on your own. The

1 evidence is, they needed to get there. And in fact this was
2 Mr. Hilt's testimony: "We were in the book business. People
3 were moving into digital books. We needed, as a bookseller, to
4 offer that option to our customers, and we were going to do it
5 any way we could." And they needed to do it quickly.

6 What did Mr. Barnes tell you would have been known
7 back then? Well, he agreed that they would have known that
8 they needed to do this. Remember, he told you about the book
9 of wisdom, that they know what is going on. The parties would
10 have been aware of the ongoing competition. They would have
11 known that if they didn't enter into the agreement they can't
12 use the technology.

13 Remember, it's a negotiation when they walk in saying,
14 your patents are valid and infringed -- very, very different
15 than that Amazon discussion.

16 (Continued on next page)
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1 Amazon said, your patents aren't infringing, we don't
2 think they are valid, we are in litigation. Then they settled,
3 they compromised.

4 At this negotiation, Barnes & Noble walks in and says,
5 I know your patents are valid and infringed, I know I need this
6 technology. They didn't offer, you heard nothing about how
7 they could have worked around this. They could have told you
8 these were small changes, this was accidental, I could just
9 make a small change, I could have been out of this if I needed
10 the patent, who needed it.

11 You haven't heard one word of evidence, not one word,
12 of how they could have avoided using this technology. That's
13 what makes these patents valuable. Right? No one has told you
14 there was an alternative to using this technology. No one has
15 told you that. He tells you the parties would have known about
16 the agreement that Amazon entered.

17 How do you price this? What we know is that Barnes &
18 Noble was successful against Amazon. How much did you hear
19 them talk about Barnes & Noble's a startup company, no product?
20 Barnes & Noble is a billion-dollar company. This is no startup
21 with no money. And they were successful. They got to grow
22 almost half the size of Amazon.

23 MR. EDERER: Objection, your Honor.

24 THE COURT: Overruled.

25 MR. BAUER: In the year 2010 Barnes & Noble was about

40 percent the size of Amazon. That's the testimony.

2 million units in less than -- in about a year. All right?

They are successful.

What does he come in to do? What does Mr. Barnes tell you would be the right amount? He tells you 8 cents a unit. How does he get there? He goes to the Amazon agreement and he wants to divide that Amazon agreement by as big a number as he can to turn it into a royalty rate.

Rather than look at how many Amazon had sold up till then and divide it by that number, which was the numbers he has up there -- using his numbers it's about 25 million units, something like that -- rather than dividing what Amazon paid by that and telling you what it was, he projects out for six years.

Where did he get those projections? He made them up. He multiplied numbers by 10 percent when we know that the facts, the facts were that they were going down. He was coming up with a big number so he can drive the royalty rate down.

What we got here, these are the sales numbers he told you were actual. He knew this when he did that chart. He says, I don't care what really happened. That's what he said, I don't care what really happened. He said, I'm putting in there what I, Mr. Barnes, think the Amazon people were projecting at the time, with no real evidence showing that they were projecting. For 2011 he put in the number 19 million when

1 he told you they were projecting 18 million.

2 He knows that it's going down. We don't know the last
3 three years, but we know that it's going down, you know that
4 it's going down. Do the numbers. If those things had gone
5 down, if the number was half, that royalty rate would double,
6 to 16 that he is proposing. If the sales had dropped two-
7 thirds, that number would triple to 24. That's why he's
8 putting in big numbers.

9 MR. EDERER: Objection, your Honor. There is no
10 foundation for those numbers in this case.

11 THE COURT: Overruled. Counsel, your time really is
12 up. I will give you a couple of more minutes. That's it.

13 MR. BAUER: I'm on my last couple of slides. Thank
14 you, your Honor. I appreciate that.

15 The question you are asked is when you look at the
16 number that they propose, you test it against the Amazon
17 number. That's what you do. What would they have negotiated
18 in 2009? Who knows. We are trying to figure that out. We are
19 asking you to figure that out, what would they have negotiated
20 in 2009, what would have been fair, what would have been
21 reasonable? We ask you to do that.

22 What we know for a fact is two years later Amazon paid
23 \$12 million. That's your testing point. That's the test.
24 Think of it this way. Mr. Barnes said think about property,
25 housing. You buy a house or somebody tells you your house is

1 worth less than a million dollars in 2009 and that's what they
2 tell you and you do that deal. Two years later the house next
3 door that's just a little bit bigger than yours, more than
4 twice your size, sells for 12½ million. Do you think you got
5 the fair price? Was that the right number? That's what we are
6 asking, what would be the right number knowing that Amazon paid
7 2 million years later and compensatory damages.

8 One last thing. How valuable is this technology? Let
9 me talk about that Lend Me feature, and then I'm done. Mr.
10 Hilt said 4 percent of the people -- this was PTX-183, Nook At
11 A Glance, you will see that exhibit, Nook At A Glance -- 4
12 percent said it was one of the top three reasons people buy it.
13 He says its a minimal number, 4 percent, minimal, pooh-pooh, 4
14 percent.

15 Well, in 2010 they had 2 million units. Take 4
16 percent of 2 million units. That's about 80,000 units.
17 Multiply it by he told you the average selling price in the
18 \$300 range. 80,000 times 300. That's 24 million bucks of
19 extra sales for the feature that has minimal value. And that's
20 just 2010. Small number, big dollars. These patents are
21 valuable.

22 What is a reasonable royalty? There's 5 million units
23 in dispute here. We know that ADREA would have taken 50 cents
24 a unit back in 2012, before this litigation, with the risk of
25 litigation. There is your verdict form. We ask you to put in

1 a number that is reasonable as the judge defines reasonable for
2 damages, and that you find that there is willful infringement.

3 Thank you very much. I don't get a chance to come
4 back up here again. I really do thank you for your time.
5 ADREA really thanks you for your time. This has been a long
6 week. We appreciate it.

7 Thank you, your Honor.

8 THE COURT: Thank you very much.

9 Ladies and gentlemen, we are going to give you a
10 ten-minute break at this time and then we will hear from
11 defense counsel.

12 (Recess)

13 THE COURT: Now we will hear from defense counsel, who
14 I will give an hour and 3 minutes to, being equal time.

15 MR. EDERER: I won't need the extra three minutes,
16 your Honor.

17 Good morning, ladies and gentlemen. On behalf of
18 Barnes & Noble, we wish to thank you for your service and the
19 incredibly close attention that you have been paying to the
20 evidence in this case. We know it's been a long few weeks, but
21 this is an extremely important matter to Barnes & Noble. Based
22 on everything we have seen, we are confident you will give the
23 evidence the careful consideration that it deserves, and when
24 you apply the law which the judge will instruct you with, you
25 will come out the right way, the only way we believe you

1 should, and you will reach the only conclusion that the
2 evidence clearly points to: That there has been no patent
3 infringement here on the part of Barnes & Noble.

4 I am going to take some time to review with you the
5 evidence you have heard over the course of the trial. I am
6 also going to ask you to think back, if you can, to my opening
7 statement and some of the things I told you Barnes & Noble
8 intended to prove to you.

9 I want you to think about whether the evidence has
10 shown what we said it will show, which is that plainly and
11 simply the facts do not bear out that there has been any
12 infringement of the patents at issue in this case and that in
13 any event, and you only need to get to this issue if you find
14 infringement on any of these patents, which we strongly believe
15 you won't, but in the unlikely event that you find that any of
16 these patents has been infringed, that in any case the evidence
17 will show that each and every one of these patents is invalid.

18 They are simply not new, they are not inventive, and
19 they are completely anticipated or obvious. While the
20 inventors named on these patents may have thought they did
21 something new, if the invention existed before or was obvious
22 based upon what others had done previously, then, even if the
23 patent office did not realize it, you can't have a valid U.S.
24 patent on it. This issue of invalidity is also something to
25 keep in mind, and I will address it as well in my closing.

1 Before I get to the patents, however, as I did in my
2 opening statement, I want to remind you who the parties are in
3 this case and what we are doing here. I think that all of the
4 evidence, and especially the testimony of the witnesses and
5 their credibility, should be examined in that light.

6 On the one hand, you have Barnes & Noble, a long-
7 standing member of New York community and an important part of
8 the nation's fabric, who for 70 years has been a leader and an
9 innovator in the area of book selling. You heard from Mr. Hilt
10 that Barnes & Noble sold the Rocket eBook reader in the early
11 2000s, before the market was even ready for it.

12 As electronic reader technology began to improve in
13 the mid 2000s, Barnes & Noble, who, as you have heard, had
14 already been a pioneer in offering electronic books and other
15 content on the Internet, made a decision to expand its product
16 offerings. In particular, as Mr. Mulchandani and Mr. Hilt
17 explained to you, the idea was to make books and content
18 available to Barnes & Noble account holders across as many
19 electronic platforms as possible.

20 That would mean making them available not only on the
21 Internet but on electronic devices and through other means that
22 would allow the user to read and access content wherever they
23 might find themselves -- at home, on the road, anywhere --
24 using only their Barnes & Noble account credentials to gain
25 access to these books through the Barnes & Noble cloud.

1 As you have heard, as part of this initiative, the
2 Nook was born in 2009. Barnes & Noble expended substantial
3 resources in an effort to become a leader and an innovator once
4 again in a highly competitive market, coming out with many
5 firsts in the area of electronic reader devices and also
6 introducing various features designed to enhance the user's
7 experience, including the Lend Me and shop features that are
8 the subject of this case.

9 With each of those features, Barnes & Noble did it
10 their own way, creating something new and different that works
11 on an account basis across many different kinds of devices, not
12 just Nook devices. In the case of Lend Me, Barnes & Noble
13 created a lending function that, as you have heard, has become
14 the subject of its own allowed U.S. patent. In the case of
15 shop, Barnes & Noble designed a special purpose web browser,
16 through which a user can have his or her own personalized
17 shopping experience while browsing for books and content on the
18 Barnes & Noble website and can also share that shopping
19 experience on the World Wide Web, including on Twitter and
20 Facebook.

21 In contrast, on the other side of this case, we have
22 "AY-dree-a" or "ay-DREE-a", I'm not sure which it is. As you
23 have now heard, ADREA is a company that does nothing. The
24 company has no employees, no product, not even a written
25 business plan. It was set up exclusively to attempt to

1 monetize some ereader patents dating back to the 1990s that no
2 one ever had any interest in.

3 As you have heard, over the course of its five-year
4 existence, despite whatever efforts it's made, ADREA has failed
5 to place a single license for any of these patents outside of
6 its settlement in the Amazon litigation. None of the companies
7 they targeted -- not Samsung, not Kobo, not Kno, not anyone --
8 no company involved in the electronic book industry had shown
9 the remotest interest in these patents, even back in 2011,
10 after Mr. Shamoon wrote to Mr. Hendricks.

11 You saw this email on Mr. Bauer's closing. Mr.
12 Shamoon wrote to Mr. Hendricks of Discovery that now that the
13 Amazon case has been settled, he was looking forward to
14 developing a healthy and a creative licensing program for the
15 Discovery patents. That program is more unhealthy than it's
16 ever been. In fact, in its five-year existence, ADREA has only
17 done two things: It settled the litigation with Amazon that it
18 inherited from Discovery, and then it sued Barnes & Noble.

19 When they decided to sue Barnes & Noble, maybe they
20 thought they had an easy mark, that we would write them a check
21 to avoid the pain of expensive litigation, like Amazon did.
22 Well, guess what. That's not what Barnes & Noble is about.
23 Barnes & Noble has always striven to be an innovator, a
24 business and technology leader. When Barnes & Noble gets sued
25 for something it didn't do, it doesn't just roll over, it

defends itself.

That's why we are here today, and that's why we are asking you, the jury, to send a message to ADREA that its monetizing model is a failure. We didn't infringe their patent, we didn't do anything wrong, and we believe we have proven that to you during the course of this case.

Before I start talking about the substantive issue in the case, I want to briefly review with you some of the witness you have seen and heard. As you know, the credibility of the witness, what you believe about what they have said and what you don't believe, is very important.

Who did you hear from? Let's take the Barnes & Noble witnesses first. First you heard from Mr. Mulchandani, the head of software development for Nook products for years, someone who was intimately involved in the product development process. He told you exactly how the Nook works, on an account-by-account basis across all platforms. Not one ADREA witness contradicted anything Mr. Mulchandani said about how the Nook works. They just tried to put their own spin on it.

But you saw him. He was knowledgeable, he was credible, he was forthcoming, and he was clear. As we showed you and as all of ADREA's witnesses have conceded, Mr. Mulchandani's testimony was completely corroborated by how the Nook actually works.

You also heard from Mr. Hilt. Mr. Hilt explained to

1 you everything you need to know about how and why the Nook was
2 launched and marketed. The uncertainty of how the Nook would
3 be received by consumers, how it would compete, all the risks
4 and the difficulties Barnes & Noble had in penetrating the
5 market given the complete domination by Amazon, and how the
6 Nook features that are being accused in this case were actually
7 used and their relative lack of importance to Nook customers
8 and sales.

9 He told you that shop was not important in driving
10 sales of the Nook, even though he did say it allows you to
11 search and browse for books. He also told you that while Lend
12 Me sounded like a good idea, as it turned out, the major
13 publishers did not make their books available to loan using
14 Lend Me and people didn't use it very much.

15 In fact, in the study Mr. Bauer mentioned when he told
16 you to do that division exercise when he was talking about
17 damages, about the top three features of the Nook, Lend Me
18 being one of those, only 18 people responded, 18 people
19 responded and said that Lend Me was one of the top three
20 features that caused them to buy the book. Mr. Hilt was
21 another credible and knowledgeable Barnes & Noble witness.

22 Finally, we had Dr. Clifford Neuman. Yesterday Dr.
23 Neuman methodically took you through all the reasons why, in
24 his opinion, the patents in this case are not infringed and are
25 invalid. His testimony was direct and straightforward and as

1 clear as could be given the technical nature of what he was
2 talking about. I suggest to you that his testimony was in
3 sharp contrast to the testimony of ADREA's technical experts,
4 who I will come to into second.

5 So, if you have any questions in your mind about
6 infringement or invalidity, consider the testimony of Dr.
7 Neuman, and you will have the answers. What he did, unlike any
8 other witness in this case, is he took the infringement and
9 invalidity claims head-on and he showed you step by step why
10 the patents are not infringed and why they are invalid, and it
11 was so clear and so believable.

12 Now let's contrast all of this with ADREA's witnesses.
13 We think if you compare the ADREA witnesses with their Barnes &
14 Noble counterparts, they all come up well short on the
15 credibility spectrum.

16 First, there was Mr. Shamon, the CEO but not employee
17 of ADREA, who admitted spends about 5 percent of his time on
18 ADREA business. He was trying to tell you what an enterprising
19 young company ADREA is and all the great things that it is
20 doing to build a business in the ereader space.

21 But by the end of his cross-examination, he had
22 basically conceded that his company has done virtually nothing
23 in five years to develop its business and is literally doing
24 nothing right now. It's doing no market research, placing no
25 licenses, developing no products, nothing. That's because it's

1 a nonpracticing entity whose only purpose is to try to make
2 money off patents. That's the take-away you should have for
3 Mr. Shamoon when you think about the parties to this lawsuit
4 and where they fall on the credibility spectrum.

5 You also heard the testimony of Mr. Ambwani, ADREA's
6 director of licensing, you watched the videotape yesterday, who
7 couldn't remember much about what he did to try and place
8 licenses for ADREA over four years. But the one thing he could
9 remember was that ADREA was all about trying to make money off
10 patents.

11 Next was Mr. Shteyn. What can I say about Mr. Shteyn,
12 who was license listed as an inventor of what we have been
13 calling the garbage can patent? On his cross-examination he
14 wouldn't answer a single question, and he started to give some
15 very flip answers about his invention.

16 You remember he kept saying, well, garbage cans and
17 blenders can be used for anything, like for playing the drums
18 or for use as weapons against intruders. Indeed, by the end of
19 his testimony it seemed like Mr. Shteyn was saying he invented
20 just about anything having to do with connecting to the
21 Internet. I suggest to you that his testimony was not
22 credible.

23 We also heard from three inventors on the '851 patent:
24 Mr. Hendricks, Mr. McCoskey, and Mr. Asmussen. You heard what
25 they said very clearly. Incredibly, none of them could

1 remember exactly what it was they invented. I want to come
2 back to them in a few minutes because I want to remind you
3 about the story we promised you you would hear about, about how
4 they pieced their patent application together by copying
5 material from much older encryption textbooks.

6 Now let's talk about Mr. Berg, ADREA's technical
7 expert, who along with his colleagues has been paid almost
8 \$500,000 for this case, the man-in-the-middle guy who hacked
9 into the Nook devices but didn't even bother to test all of the
10 products he was accusing.

11 You heard Mr. Berg. All he did here in court was
12 agree with the words his attorney was putting in his mouth
13 about his infringement opinions and then falling back on
14 unspecified deposition testimony of Mr. Mulchandani and Mr.
15 Narain. I'll come back to Mr. Narain in a little bit.

16 One thing that Mr. Berg didn't do. He did not once
17 contest with any specific evidence any of the factual state-
18 ments made by any of Barnes & Noble's witnesses as to how the
19 Nook actually works and how it interacts with the Barnes &
20 Noble cloud. In fact, he agreed wholeheartedly with Barnes &
21 Noble's witnesses on this.

22 At the end of the day, in order to get around how the
23 Nook actually works and the fact that it doesn't do what these
24 patents cover, all Mr. Berg could do with you was play word
25 games. Remember when we were talking about when the lending

1 period starts for the Lend Me feature?

2 On the one hand, as far as Mr. Berg was concerned,
3 even though the clock starts before download of the book, that
4 was the same as the clock starting after the download of the
5 book. But then, when he was talking about the selection
6 requirement of the '851 patent, when it comes to purchasing
7 books on the Barnes & Noble website, somehow the word "select"
8 is different from the word "choose."

9 You may remember that when Mr. Berta was questioning
10 him, Mr. Berg kept admitting that it was in fact the user, not
11 the device, who was selecting the book, but instead of using
12 the word "selecting" he kept using the word "choosing," as if
13 that somehow meant something different from "selecting." At
14 the end of the day, you should find that Mr. Berg's testimony
15 also fails the credibility test.

16 Finally, we have Dr. Wang, the rebuttal expert who you
17 heard for 15 minutes yesterday. While his testimony was brief,
18 it was notable mostly because in discussing invalidity, his
19 view of the patent claims was different from Mr. Berg's. For
20 Dr. Wang, memory cards make prior art different, even though
21 for Mr. Berg memory cards in the Nook support infringement.
22 For Dr. Wang, if the time period for an electronic book starts
23 before it gets to the reader, that makes the patent valid, but
24 for Mr. Berg that was infringement when it came to the Nook.

25 The most important thing you can take away from Dr.

Wang is that he contradicted the positions of his own counterpart Mr. Berg, and he never even bothered to review Mr. Berg's expert report. It is also worth noting that Dr. Wang respects our technical expert Dr. Neuman and holds him in high regard.

Now let's talk about the patent claims in this case and what the evidence has and has not shown with respect to the issues of infringement and invalidity. First, on the issue of infringement, as Judge Rakoff will instruct you, the burden of proving patent infringement is on ADREA. It is not Barnes & Noble's burden to disprove infringement.

It is ADREA's obligation to show, based on the preponderance of the evidence that the Barnes & Noble feature being accused of infringement meets each and every single element of the patent claims that the feature is accused of infringing. If we do not meet every single element, we do not literally infringe that patent.

Before I get into any of the individual features of the Nook that have been accused and the patent claims themselves, I want to remind you of something I alerted you to in my opening statement and which you have heard a great deal about from the Barnes & Noble witnesses who have testified at this trial. That is that in this case we are basically dealing with a bunch of old patented technology that is in sharp contrast with the new technology being used by Barnes & Noble.

1 After hearing the evidence, we believe you should have no doubt
2 that what I told you would be the case is in fact the case.

3 These patents all cover old technology that is tied to
4 physical devices. All of them have to do with how technology
5 works on a device, an electronic reader, a consumer appliance,
6 like a blender or a garbage can. But none of these patent has
7 anything to do with what Barnes & Noble is doing on the Nook,
8 all of which, as Barnes & Noble witnesses have clearly
9 explained, has to do with account-based server technology that
10 works across many different platforms, devices, apps on the
11 iPhone, your iPad, Android devices, and the World Wide Web, you
12 name it. The technology that Barnes & Noble is using has
13 everything to do with what's happening in the cloud, that one
14 little word that you have heard so many times in this case.

15 So, we are truly talking about apples and oranges
16 here, device-based technology versus cloud-based technology. I
17 want you to think about this and remember this as we go through
18 the patent claims and when you sit down to deliberate on the
19 issue of infringement.

20 You may also need to decide whether these patents are
21 valid or invalid. As you will be instructed, in that case the
22 burden does shift over to Barnes & Noble to show, based on the
23 property and the technology in existence at the time the patent
24 application was filed, that either the invention already
25 existed, in which case it's what we call anticipated, or that

1 the invention was obvious, that is, whether someone familiar
2 with the prior art could have figured it out for themselves.

3 Although we don't think you will have to get there,
4 since we don't believe that you should find that any of these
5 patents have been infringed, if you do get to invalidity, we
6 think the evidence clearly and convincingly shows that these
7 so-called inventions were either already in existence or were
8 obvious to someone familiar with the technology.

9 In my closing today, I am only going to focus on
10 certain aspects of the patent claims, in the interest of time,
11 even though I do have an extra three minutes. But I want you
12 to remember that in order to infringe, the accused product or
13 feature has to meet all the elements of the patent claim.

14 Dr. Neuman took you through every single element the
15 day before yesterday, every step of the methodology, so I'm
16 leaving that with him. If I don't happen to highlight for you
17 every single one of these elements, please forgive me. Or
18 maybe you will thank me, I'm not sure. I just want to make
19 sure you understand that by not mentioning a particular claim
20 element, I am not conceding that any of these elements have
21 been met. But in the interest of time, in discussing these
22 patents I'm going to focus in my closing on some of the key
23 claim elements.

24 The '703 patent. Let's talk about that patent, which
25 Barnes & Noble's shop feature is accused of infringing. As you

1 recall, the '703 patent is not specifically directed to
2 ereaders. Rather, it generally covers consumer appliances.
3 The idea is that without having to do anything else, you go
4 over to the appliance and you press what's called a single-user
5 input, for example, a button on the appliance. Then, without
6 accessing a web browser -- and that's the key -- it takes you
7 to a dedicated website on the Internet for information about
8 the context of usage where that particular appliance can be
9 found.

10 You remember that the inventor Mr. Shteyn came in here
11 and tried to broaden the scope of his patent to cover the
12 Barnes & Noble shop application by saying that context of usage
13 can mean just about anything, not only garbage collection
14 information for your neighborhood, but if you use garbage cans
15 to play the drums, the context of usage information can relate
16 to that as well. As I said before, I'll let you assess the
17 credibility of Mr. Shteyn as a witness.

18 In any case, there are a few important points to keep
19 in mind here about the '703 patent. The '703 patent has two
20 sets of claims. First, there is claim 1, which we call an
21 independent claim, and some other claims that depend on claim
22 1, all of which ADREA says are infringed by the Nook device
23 itself because of the shop feature.

24 Then there is claim 13 and another claim that depends
25 on it. Claim 13 is what's known as a method claim. For this

method claim, ADREA is saying that Barnes & Noble, not the user, takes all of the steps laid out in the claim also because of the shop feature.

As I said, claims 1 and 13 are independent claims. I want to focus on the specific reasons that we don't meet these two independent claims.

First, for claim 1, as the evidence clearly shows, claim 1 requires that shop not be a web browser. As you have heard, there are different kinds of web browsers. There can be those that are for special purposes and those that are for general purposes, but they are all still web browsers. The fact is, as we have shown, shop is a special-purpose web browser. It's as simple as that.

We showed you many times what shop does. It browses, it searches, it displays web pages, all of which even ADREA's witness admit to be true. Don't forget our little demonstration that we did for you here in the courtroom where we browsed through Twitter all the way to the full MTA website on the Internet. We also showed you that shop even identifies itself as a web browser. Remember when Dr. Neuman pointed out that it identifies itself as Mozilla or Safari?

You also heard Mr. Mulchandani testify that shop was deliberately built from the same Android web engine used to build a general purpose web browser found on some Nook devices and to have web browsing capabilities just like a general

1 purpose web browser, but instead it was designed to have a
2 special purpose, which was to allow the user to browse and
3 search for content on the Barnes & Noble website, which is the
4 reason why shop does not have an address bar that you can type
5 a web address into.

6 That's because, as Mr. Mulchandani explained, it's
7 like a bookmark to your favorites website on a general purpose
8 web browser. But it is still a web browser. You don't need an
9 address bar to browse the Internet and you don't need an
10 address bar to be a web browser.

11 What is ADREA's position? ADREA says shop is not a
12 web browser, because you can't use it to go anywhere on the
13 Web. What evidence does ADREA claim to have of this? Well,
14 they say shop doesn't have an address bar that you can type the
15 address into. Then ADREA falls back to its position that when
16 in doubt, let's refer to Mr. Narain's deposition testimony and
17 claim that Mr. Narain said something he didn't say.

18 What Mr. Narain testified at his deposition is that
19 the Nook Simple Touch doesn't have a web browser. The focus on
20 this one question and answer that you saw in Mr. Bauer's
21 closing is just so misleading in the context of his entire
22 testimony. Anyway, at this one single point in his deposition
23 where he was asked this very isolated question, Mr. Narain was
24 clearly being asked and clearly understood he was being asked
25 about a general purpose web browser, and that's how he

1 responded.

2 In fact, later on, when he was asked the same question
3 again, and this is the part of his testimony that you didn't
4 see go up on the screen during Mr. Bauer's closing, Mr. Narain
5 testified that the device doesn't expose web browsing
6 capability, meaning you don't see a general web icon on the
7 device. But clearly what he meant was that the device did have
8 web browsing capability.

9 Of course, plaintiff's counsel never bothered to ask
10 Mr. Narain if shop was a web browser. That question was never
11 asked at his deposition. Or to ask him the follow-up question,
12 which would have been something like, And what do you mean by
13 not exposing web browsing capability? Because he knew what Mr.
14 Narain would have said that just because the device does not
15 have a separate general purpose browser doesn't mean that shop
16 isn't a web browser, too.

17 Also, for claim 1 of the '703 Barnes & Noble doesn't
18 need the additional requirement that the device have a
19 predetermined URL or identifier that is associated with it. If
20 you agree with Barnes & Noble that shop is a web browser, you
21 don't even need to consider this point or you can start with
22 this one. This is an independent second reason why Barnes &
23 Noble doesn't infringe claim 1 of the '703 patent.

24 Also, for claim 1 of the '703, Barnes & Noble doesn't
25 need the additional requirement that the device have a

1 predetermined URL or identifier that is associated with it. If
2 you agree with Barnes & Noble that shop is a web browser, you
3 don't even need to consider this point, or you can start with
4 this one. This is an independent, second reason why Barnes &
5 Noble doesn't infringe claim 1 of the '703 patent.

6 Now, on the URL issue, as you heard from Dr. Neuman
7 yesterday, all of the Nooks except the Nook 1st Edition go to
8 the same URL in the Barnes & Noble cloud. The key point here
9 is that this URL isn't associated with the Nook, it's
10 associated with the cloud. The reason we know that, as you
11 heard from Mr. Mulchandani, is that this is the same URL used
12 by all Nook devices except the first device, and also all Nook
13 software applications running on non-Nook devices, including
14 ones that are used on things like Windows and Android phones.

15 So, unlike the patent, where there is a URL for the
16 type blender and a URL for the type garbage can, there is no
17 URL for the Nook devices. So we just don't meet this claim
18 even if it does cover intruder-repelling garbage cans, as Mr.
19 Shteyn testified.

20 Now, on the identifier requirement, this applies to
21 both claim 1 and claim 13. Barnes & Noble doesn't meet it,
22 either. The requirement is that initiating access to a web
23 page and retrieval of information must be based on an
24 identifier that is associated with the device. That is just
25 not the way the Nook works. We just don't use the identifier

1 that is required by this claim.

2 As you heard, yes, there is a model number and a
3 device ID that is sent to the cloud when the shop feature is
4 activated. But these identifiers are not the basis for the
5 information the cloud sends back down to the device. In fact,
6 as Mr. Mulchandani testified, the model number is essentially
7 thrown away, and neither the model number nor the device ID is
8 used to gather any information to be sent back. Rather, the
9 cloud uses a different identifier, what is called a product
10 device ID, as well as customer information in order to
11 personalize shop for the customer.

12 By the way, you heard Dr. Neuman say that Mr. Berg's
13 man-in-the-middle analysis on this issue was useless because it
14 could not see what was actually happening with these
15 identifiers on the Barnes & Noble cloud.

16 One more note on the identifier issue. For claim 13
17 it is required to be an identifier representative of a type of
18 consumer appliance. That just doesn't happen, either. Again,
19 it is undisputed that the model number is not used for this and
20 the device ID is an identifier for the actual Nook device
21 itself, not a type of Nook device.

22 Last thing on the '703 patent on the issue of
23 infringement. On claim 13, as I said before, this is a method
24 claim. It requires what is called a single-user input that is
25 provided by Barnes & Noble to initiate retrieval of the

1 information. But, as you heard, Barnes & Noble doesn't
2 configure your Nooks for you when you take them out of the box,
3 and Nooks simply can't function at all unless the user sets
4 them up. As Mr. Mulchandani explained, the Nook can never be
5 connected to a home network unless the customer configures it.

6 You also heard Mr. Berg, their technical expert, admit
7 that he had to set up the Nooks he was testing on his own home
8 network by himself in order to be able to hack into them. And
9 even after the user sets them up, a Nook device needs to be
10 powered on and unlocked before you can launch the shop. It is
11 not about going over to your garbage can or blender and pushing
12 a button. There are all these steps that have to be taken
13 first.

14 The key here on claim 13 is that it is not Barnes &
15 Noble that connects the Nook to the home network, it is the
16 user who does that, and it is only when that happens that the
17 device can even interact with the cloud. The key here is that
18 since it's the user and not Barnes & Noble who is taking these
19 required steps, Barnes & Noble cannot be infringing this method
20 claim. You heard Dr. Neuman take you through all of the claims
21 very methodically. He showed you why there is no infringement
22 of the '703.

23 Now let's talk about the validity of the '703 patent.
24 As I said, we don't think you will even have to get here. But
25 if you do get to invalidity, we think it is clear that the

1 claims ADREA accuses Barnes & Noble of infringing were nothing
2 new or at least were obvious to someone familiar with the
3 technology. We believe you should find the '703 patent to be
4 invalid.

5 In my opening I told you about a patent issued to a
6 guy named Munyan. As you have now seen, the Munyan patent
7 covers exactly what is covered by claims 1, 2, and 3 of the
8 '703 patent. It was filed long before the '703 patent. Munyan
9 is a patent that shows a handheld electronic book reader with a
10 touch screen. This book reader has an identification code
11 stored in its memory which when he can be used to identify
12 itself to an online bookstore.

13 That's what happens when the user depresses the
14 bookstore icon on the touch screen. The reader connects to a
15 remote server and identifies itself. Then, if the server
16 recognizes the reader, it sends back information, such as lists
17 of libraries and other services. The reader does all of this
18 without accessing a web browser. As Dr. Neuman explained, this
19 is exactly what the '703 patent covers in claims 1 and 3.

20 When it comes to claim 2 of the '703 patent, which
21 basically only adds the element of connecting to the Internet
22 through a home network, Dr. Neuman explained how it would have
23 been obvious to modify Munyan to do that. As Dr. Neuman told
24 you, by the late 1990s, before the '703 patent was filed, it
25 was common for devices to connect to the Internet over a home

1 network. This old Munyan patent completely invalidates claims
2 1, 2, and 3 of the '703 patent specifically for electronic book
3 readers.

4 You also heard about a patent issued to this fellow
5 Mark Bolas, who invented an Internet radio. With Bolas, all
6 you have to do is press a button or turn a knob, and the radio
7 will automatically reach out to the Internet and find the
8 Internet radio station you want to hear. How does it do that?
9 Just like in the '703 patent, the radio identifies itself to an
10 Internet radio server, which uses what the radio sends to find
11 the station's web page and point the radio to the music.

12 The radio doesn't just get music. It also gets
13 information that describes the channel the listener is
14 listening to, in other words, just like the context of usage
15 requirement of the '703 patent. As Dr. Neuman explained, all
16 of this is exactly what claims 13 and 15 of the '703 patent
17 supposedly cover, but Bolas did it first.

18 What does ADREA say in response? Music for a garbage
19 can is context of usage information when it comes to infringe-
20 ment, but music for a home Internet radio all of a sudden isn't
21 context of usage information. So, any way you look at it,
22 whether it is Munyan or Bolas or both, unfortunately for Mr.
23 Shteyn, his patent should never have issued and it is invalid.
24 Dr. Neuman went through this with you step by step and he
25 showed you why.

1 Now let's talk about the '501 patent. That's the one
2 that ADREA is claiming that Barnes & Noble infringes with its
3 Lend Me book lending feature. The claims we are focused on
4 here are claims 7 and 18, which are the two independent claims
5 of the patent that are at issue. Both of these require that
6 the lending periods start when the book is stored on the device
7 and the time is then tracked on the device.

8 You heard the testimony of Mr. Mulchandani and Dr.
9 Neuman on this one. Lend Me is completely different. Lend Me
10 is a cloud-based feature that works across all Barnes & Noble
11 platforms, not just the Nook device. That is the key point
12 here. The way our lending feature works, including when it
13 starts and how it tracks the lending period, is the key to this
14 whole discussion.

15 Everything happens in the cloud, not on the device.
16 The lending time is tracked in a completely different way from
17 what is described in the patent. It is all on the cloud. And
18 the time begins to run on the cloud's clock before any book or
19 any other content is downloaded or stored on the device. There
20 is no dispute about this. That's how it works. It's a
21 completely different concept. Mr. Mulchandani and Dr. Neuman
22 explained this to you in detail and show you exactly how the
23 clock works, when it starts and where it's kept.

24 It starts when the cloud processes the loan
25 acceptance. Then there are a bunch of other steps that have to

1 happen before the book is downloaded to the device. As Mr.
2 Mulchandani told you, the clock is already running when all of
3 those steps are taking place, and the clock continues to run no
4 matter what happens to the book or when it get downloaded to
5 the device. In the patent, on the other hand, the clock begins
6 to run only when the book is stored on the device; the clock is
7 kept on the device.

8 Whenever the download happens on the Nook, whether
9 it's three seconds, the happy path that Mr. Mulchandani told
10 you about, or three hours, the not so happy path if there are
11 connectivity problems or whatever, it does not matter. It's
12 not about how long the download takes, it's about how and when
13 and where the clock starts, how the time is kept.

14 It is undisputed that the clock starts on acceptance
15 of the loan, not upon storage of the book on the device. The
16 evidence is clear that the clock starts running before anything
17 is ever downloaded to the device no matter when or how fast
18 that happens.

19 Dr. Neuman took you through this very carefully step
20 by step and showed you with his demonstration slides what
21 happens when the Nook is turned off. Remember his vacation
22 experiment where he didn't download the book but the clock was
23 still running for three full days. Two distinct operations:
24 Acceptance, download.

25 Let me remind you of the library analogy I gave you in

my opening statement. Here is an example of two different ways to track time that could be very close to one another in time but which are completely different in concept.

There are two libraries in town that allow you to reserve the books online before you come pick them up. One library gives you 14 days from the time you reserve the book online, and the other library gives you 14 days from the time you come in and pick it up. The loan period could be nearly the same, say, if you reserved your book on your smart phone while you're half a block away from the library and it takes you another minute or two to get over there, but we are still talking about two completely different concepts. It is the same thing here.

By the way, a marathon is 26 miles 385 yards. You can run the first 26 miles, but if you don't run the last 385 yards, you haven't run a marathon.

ADREA says, OK, members of the jury, disregard all of this, none of that matters; what matters, even though there are several steps in between acceptance and download, is that the download happens automatically and usually takes only a few seconds. I guess the argument is that even if this is not literal infringement since no one, not even Mr. Berg, could bring himself to say that the clock is not already running on the cloud when the download happens, I guess the argument is that Barnes & Noble's cloud-based system for tracking the

lending period still infringes under the doctrine of
equivalents.

Mr. Bauer put up on the screen the Court's instruction with respect to doctrine of equivalents, but he cut it off right in the middle, after the word "insubstantial." The way to evaluate whether the accused feature is under the doctrine of equivalents is whether it does substantially the same thing in substantially the same way to achieve substantially the same result. That will be in the instruction that you receive.

What does ADREA say about that? They say it doesn't matter when and where and how the clock begins to run, it all happens really fast no matter what. But that doesn't mean the Nook works substantially the same way. No video of really fast downloads can show that a cloud-based time management system, like Lend Me, works in substantially the same way as a device-based time management system. How could it?

As Dr. Neuman explained, the time is being kept for a different purpose and it achieves a substantially different result, since Lend Me keeps track of loaned books for its customers across all of their touch points, whether it's on the device or on a Nook app or on the Barnes & Noble website. That is the purpose of a cloud-based system. A device-based system from 1994 doesn't work that way and can't do that.

As Dr. Neuman explained to you, Barnes & Noble doesn't infringe the '501 patent.

1 This patent also has a serious invalidity problem
2 because it also is completely anticipated by the prior art. In
3 my opening I told you about the Saigh reference. Now you have
4 seen the Saigh reference. You saw it in Mr. Bauer's opening.
5 I think you know what I'm talking about.

6 Clearly, the lending feature for electronic books that
7 Mr. Saigh invented works exactly the same way as the lending
8 feature in the '501 patent, but the Saigh reference did it
9 first. So, these claims from the '501 patent should have never
10 been allowed.

11 The Saigh invention covers an electronic personal
12 library apparatus which has a control unit that can be used to
13 store and read electronic books. You can copy electronic books
14 from a compact cylinder, kind of like a Compact Disc, directly
15 to the control unit's memory. When books are copied to that
16 memory, there can be a set time period after which the book
17 will be automatically erased from memory. This one is pretty
18 cut and dry. As Dr. Neuman explained, the Saigh invention
19 explains exactly what the '501 patent covers, but Saigh came
20 first by three years.

21 By the way, on this issue of the patent office having
22 considered Saigh, you saw all those documents that were put on
23 the screen and they circled the reference, just remember this.
24 Saigh was part of a list of over 700 references. The examiner
25 supposedly examined them all in a very short period of time.

1 The patent office must have missed this one. It happens. The
2 examiner is only human. When he or she are examining 700
3 patents, sometimes they miss one. But that doesn't mean that
4 the patent is not invalid. We believe you should find that the
5 '501 patent is invalid, too.

6 Finally, there is the '851 patent relating to
7 encryption. Before we get into the patent claim, I thought I
8 might remind you that in my opening I mentioned to you that you
9 were going to hear an interesting story about the '851 patent,
10 which really goes both to infringement and invalidity. That
11 was, what exactly is this invention, and is there anything new
12 about it? After all, everyone has admitted, even ADREA's
13 experts, that there was nothing new about encryption at the
14 time this patent was applied for. The concept of encryption
15 had existed for decades, and electronic reader devices also
16 existed at the time.

17 Remember you heard about the SoftBook and the Rocket
18 eBook? What exactly was the '851 invention? You saw and heard
19 the depositions of Mr. Hendricks, Mr. McCoskey, and Mr.
20 Asmussen. The same question was put to all three of them:
21 What exactly did you invent? Incredibly, not one of them could
22 answer that question. They had no idea.

23 They all admitted that the technology described in the
24 patent existed well before this patent application was filed.
25 Mr. Asmussen even admitted that his contribution to the patent

was to read a book about encryption and then, without telling the patent office, literally copy portions of that book and drop them into his patent application.

Putting aside for the moment the question of infringement, which requires a review of the patent claims and which you will see in a minute Barnes & Noble doesn't come close to infringing, what are we talking about here? Basically, we are talking about taking old technologies that already existed, ereaders and encryption, and putting them together in a way that even ADREA's own expert Mr. Berg conceded was already in existence at the time.

We ask you that in considering the issues relating to the '851 patent, you keep in mind this remarkable testimony of the three named inventors, none of whom had any earthly idea what it was they'd invented.

On the issue of infringement of the '851 patent, we are talking about claim 96 of the patent. There are basically two issues, first the encryption issue, and then there is the selection issue. I will address the first issue, what sounds like the more technical issue, which is encryption.

When it comes right down to it, the reasons Barnes & Noble doesn't infringe the encryption portion of the '851 patent are pretty straightforward. How would you know this? As you heard, there are two things that Barnes & Noble does that are undisputed in this case which completely avoid the

1 elements of this claim.

2 First, the claim requires that certain encryption
3 steps, including encrypting the electronic books, take place
4 through the device. As you heard, Barnes & Noble encrypts all
5 of its books upon receipt of the books into its cloud system at
6 the ingestion phase -- remember that term "ingestion" -- long
7 before there is any Nook device in the picture at all. They
8 use Adobe's ACS4 encryption technology to do that.

9 Very simply, encryption happens before the book is
10 purchased or sent down to any device and not in connection with
11 any storage to any device.

12 Second, as Mr. Berg admitted, their expert, in order
13 to even try to get this claim to work for them, ADREA has to
14 mix and match that new Adobe technology with what he admitted
15 was at least 20-year-old data security functionality called
16 SSL. What does that mean? I don't know if you or I exactly
17 remember what these acronyms stand for, I know I don't, but Mr.
18 Berg admitted that the Nook device does not store any of this
19 channel security information and does not transmit any
20 encryption keys or any ACS4 information.

21 Once again, this is a cloud-based system, not a
22 device-based system. Mr. Berg testified that the term
23 "encryption information," which appears in multiple places in
24 claim 96, could mean whatever it was convenient for him to mean
25 at different points throughout the claim in order to come up

1 with some sort of infringement theory. But this, too, doesn't
2 work. As Dr. Neuman explained, "encryption information" means
3 the same thing throughout the claim, and that makes perfect
4 sense.

5 On this last element of claim 96, which requires that
6 the device transmit encryption information, which includes
7 information that allows encryption and decryption of the
8 electronic book and encryption and decryption keys, this just
9 doesn't happen, because the books were already encrypted. As
10 Mr. Mulchandani testified and as Dr. Neuman explained, the Nook
11 device transmits no keys or anything else in the course of that
12 process, and the device never encrypts anything.

13 So, very simply, there is no infringement of the
14 elements of this encryption scheme, which everyone agrees,
15 including the inventors themselves, was not even invented by
16 them. Barnes & Noble just doesn't do what this encryption
17 claim covers.

18 The second issue you will be looking at on claim 96 is
19 the selection issue. That is even easier to figure out. It's
20 really simple. When the book is purchased, does the receiver
21 on the device select the book from a list of titles or does the
22 user? Use your common sense here.

23 The testimony of the Barnes & Noble witnesses was
24 clear. It's the user who selects the title, not the device.
25 The purchase button that you push when you want to buy an

1 electronic book is preloaded with an EAN number that identifies
2 that book.

3 In fact, if you remember, we showed you the metadata
4 for the book right on the Nook device. We demonstrated this to
5 you right here in this courtroom. You saw the EAN number for
6 yourselves. So, there is no selection of the device from a
7 list of titles.

8 In any case, the device doesn't select anything, it is
9 the user who is selecting the book. To the extent that
10 software on the device is somehow involved, there is no
11 evidence or expert opinion by any party to suggest that the
12 receiver on this device selects anything.

13 What does ADREA have to say about this? You also
14 heard the testimony of Mr. Berg. He had some convoluted theory
15 about software on the device doing the selecting, software that
16 he never showed you, or even the right to identify with
17 specificity. But that's when he started to parse words with
18 you again.

19 When Mr. Berta was questioning him, he started to say,
20 well, yes, it's true that the user is doing the work here, not
21 the device. But then he was careful to say that what the user
22 is really doing is choosing the book, not selecting it, and so
23 it is really the device that is doing the selecting.

24 Come on. Use your common sense. If the user selects
25 the book on the Nook, the user is also selecting the EAN

number. The device doesn't do the selecting, it's the user who does that.

By the way, look at what Mr. Berg says carefully here. He says that the Nook device does the selecting but the claim requires that the receiver do the selecting. We know that is not true, because Mr. Berg clearly and unequivocally admitted, regardless of the rest of his theory, that the receiver itself does not do the selecting. So, even ADREA's witnesses admitted that Barnes & Noble does not meet the selection requirement of claim 96.

Now let's talk about the validity of the '851 patent. As I said, the patent claim must describe something that is actually new and something that would not have been obvious when it was filed. Remember, there is no dispute that ebooks were not new when the '851 patent was filed. You heard the testimony of Hendricks, Asmussen, and McCoskey, three so-called inventors of the '851 patent, each of whom admitted that portable electronic book readers were already out there and available to the market.

In fact, they didn't just know that ereaders were already available. They bought them, they studied them, and they talked about them, and they wrote memos about them. They were basically taking these existing ideas and trying to paste them into their own patent application. They hired a whole team of people to do this.

Remember the memo from Mr. McCoskey that listed the various ereaders on the market in 1998, a year before the '851 patent was filed? One of those was the SoftBook ereader. You heard Dr. Neuman testify that the SoftBook patent, or what we call the Sachs patent in this case, covers the SoftBook ereader described virtually everything about ereaders and purchasing electronic books, including the use of encryption. You also heard Dr. Neuman testify that various kinds of encryption were very well known at the time. Once again, this patent claim is completely obvious based on the SoftBook patent and encryption references that he showed.

Now let's talk a little bit about damages. ADREA has to prove damages. Even if you find infringement, it's their burden to prove damages. They have completely failed to prove anything.

I want to remind you, ladies and gentlemen, as I told you in my opening and as the judge has indicated to you several times, I'm only talking about damages now because I have to, not because I think you will ever need to get there. As you know, if you find no infringement or if you find invalidity, you never even get to damages. We firmly believe that that will be the case here.

For all the reasons I've said, there's no infringement, and in any case these patents are invalid, so the issue of damages should never even come up in your

1 deliberations. I even debated whether I should bother to
2 address the issue in my closing. Anyway, since it's my only
3 chance, I will. And since you are probably tired of hearing
4 from me, I am going to try and keep my remarks very brief on
5 this subject.

6 On damages we have a situation here, as you know,
7 where the opinions of ADREA's damages expert have been
8 stricken. The Court has and will instruct you on this and what
9 that means. As a practical matter, what that means is that the
10 only expert opinion on damages that's in the record in this
11 case is that of Mr. Barnes, Barnes & Noble's damages expert.

12 You heard Mr. Barnes. He was credible, truthful, and
13 straightforward, and he methodically took you through the
14 manner in which he calculated a running royalty for damages.
15 What he did was he applied the Georgia-Pacific factors, which
16 the Court has already instructed you on.

17 Under Georgia-Pacific factor number 1, which is
18 whether any royalties have been received for these patents, Mr.
19 Barnes took the Amazon settlement agreement, the only agreement
20 in existence that involves the payment of anything for a
21 license to these patents -- don't forget, for all the years
22 leading up to 2009, Discovery was never able to place a single
23 license for any of these patents, and for all the years since
24 then neither has ADREA. So only one license arising only out
25 of litigation over a period of 15 years.

1 MR. EDERER: Mr. Barnes took the Amazon settlement
2 agreement, and he analyzed it carefully, and he showed you how
3 to come up with a per unit royalty rate from that agreement
4 that makes complete sense. And the numbers came out to four
5 cents for the '851, and four cents for the '501, and two cents
6 for the '703. Very straightforward, very commonsensical,
7 exactly what a seasoned damages expert should be doing.

8 But that wasn't the only thing that Mr. Barnes did.
9 He used that as a starting point. And after he did his per
10 unit calculation based on the Amazon agreement, he took those
11 per unit royalty numbers back two years, to the time of the
12 hypothetical negotiation with Barnes & Noble back in November
13 2009. Then he considered all of the similarities and all of
14 the differences between the circumstances surrounding the
15 negotiations that took place in 2011 between Amazon and ADREA
16 and the circumstances surrounding the hypothetical negotiation
17 between Barnes & Noble and Discovery and between Barnes & Noble
18 and Philips in 2009. Then he applied all of the other
19 Georgia-Pacific factors, and he found that some of the factors
20 would indicate a higher royalty number and some would indicate
21 a lower royalty number. And in the end, he concluded that the
22 numbers he derived from the Amazon agreement were fair and
23 reasonable estimates of the royalties Barnes & Noble would have
24 agreed to pay at the hypothetical negotiation back in 2009.

25 If anything, the royalty rates Barnes & Noble would

1 have agreed to pay were lower, but he kept the rates the same
2 to be conservative, and actually favored ADREA.

3 It's also important to emphasize again that there are
4 no other expert opinions in this record that you can consider
5 that would point to any other approach or any other calculation
6 of a reasonable royalty that Barnes & Noble would have agreed
7 to pay in the hypothetical negotiation. As you recall, Mr.
8 Magee's opinions were stricken, and so Mr. Barnes' testimony is
9 the only expert testimony you have.

10 And, remember, it is ADREA's burden to prove damages
11 in this case. And ADREA has proved nothing about damages. And
12 has absolutely failed to meet its burden. So if you ever get
13 to damages, which for all of the reasons I have already said
14 you shouldn't, but if you ever get there, you should go with
15 Mr. Barnes' conservative numbers as the maximum damages you
16 should award in this case.

17 And as the Court will instruct you, the starting point
18 for any damages award against Barnes & Noble is March 29, 2012,
19 not November 2009 when Barnes & Noble first started selling the
20 Nooks. March 29, 2012. So you can only calculate damages from
21 that date forward.

22 So using Mr. Barnes' royalty rates at four cents for
23 the '851, four cents for the '501, and two cents for the '703,
24 and multiplying that rate by the number of units sold in the
25 relevant periods after March 29, 2012, here are the maximum

1 damages numbers that you should use if you ever get to damages:

2 For the '851, which has an end date for damages of
3 December 9, 2012, since the patent expired on that date -- so
4 we are talking about March 29, 2012 to December 9, 2012 -- the
5 total is \$91,207; for the '501, a total of \$209,281; and for
6 the '703, a total of \$104,640. All together, about \$400,000 or
7 so.

8 This is the ceiling on what you should ever possibly
9 consider awarding for each of these patents if, and only if,
10 you find infringement on any of them, and again we don't think
11 you will.

12 And whatever else Mr. Bauer just told you about
13 damages, ADREA couldn't even find a qualified expert to say any
14 of those things. And the number that Mr. Bauer was pointing
15 you to, these were made-up numbers. So ask yourself: Why is
16 that?

17 Anyway, enough about damages. If you find no
18 infringement or invalidity on these three patents, which we
19 believe you should, then you can forget about everything I have
20 just said, about damages that is. And you don't need to do any
21 damages calculation at all. And for all the reasons we have
22 been discussing, we don't think you will ever even get there.

23 Now, I want to close the loop on one more point.

24 THE COURT: I just want to alert you you have five
25 minutes.

1 MR. EDERER: Thank you, your Honor.

2 I want to close the loop on one more point, since I
3 did mention it in my opening and you will be asked to decide
4 this, and that is the issue of willfulness.

5 Ladies and gentlemen, you have sat through eight days
6 of testimony now and I want you to ask yourselves -- and once
7 again, this issue comes up only if you find infringement, which
8 you shouldn't, but I want you to ask yourselves: Have I heard
9 one shred of evidence in this case that suggests that for one
10 second Barnes & Noble was acting willfully in any way, shape or
11 form? And the answer is no. Barnes & Noble didn't know about
12 these patents when it designed the Nook. It didn't copy them.
13 And there is no question that we have presented you with strong
14 defenses that show that we reasonably believed we didn't
15 infringe. So if you ever reach the point of finding
16 infringement on any of the patents, which we don't think you
17 will, I have two words for you: No willfulness.

18 So finally I come to the end of what I hope was a not
19 too long-winded summary of the evidence that has been
20 presented. Once again, I want to thank you for your service
21 and your undivided attention to this extremely important
22 matter. And we recognize it's not what you do every day, but
23 it's an important service to our judicial system, and we really
24 do appreciate it.

25 I will now remind you one last time of the underlying

1 theme of my opening, which is very simply use your common
2 sense.

3 Ladies and gentlemen, I know there are some very
4 technical issues presented in this case, but at the end of the
5 day these issues, even the technical ones, are pretty
6 straightforward. And we believe that if you use your common
7 sense, consider all the evidence, and apply the law to the
8 evidence as the judge will instruct you, the decision is very
9 clear-cut.

10 No infringement on the '851 patent, a patent which the
11 inventors didn't even know what they invented. And the books
12 are encrypted before they ever get loaded to the device. And
13 the user selects the book, not the device.

14 No infringement on '703 patent.

15 Sorry, guys, I mixed you up there.

16 Remember, the shop page is a Web browser. There is no
17 single user input. And there is no URL associated with the
18 Nook device. And no evidence that the model number or device
19 ID is used to retrieve information.

20 And no infringement on the '501 patent. Remember, the
21 lending period starts upon acceptance of the loan in the cloud,
22 before the download of the book, and is trapped in the cloud,
23 not on the device.

24 So my final words to you are: Use your common sense
25 and you will find no infringement on the '851, no infringement

1 on the '703, no infringement on the '501. And make sure you
2 check the right boxes on your jury verdict form. Do you find
3 infringement? No, no and no.

4 Thank you very much.

5 THE COURT: Thank you very much.

6 All right, ladies and gentlemen, we are going to take
7 a 15-minute break at this time and then I will give you my
8 instructions of the law. And then two things will immediately
9 occur after that. One is your deliberations and the other is
10 your lunch. But we will take a 15-minute break now.

11 (Jury exits courtroom)

12 THE COURT: All right.

13 MR. BAUER: We have two exceptions to the closing that
14 they just made that we would like to address with you.

15 THE COURT: I am happy to do that, but I have to take
16 a conference call from 12:15 to 12:25. So when we come back I
17 will hear you on that.

18 In the meantime, while we are taking this break,
19 counsel for both sides need to put together in a cart that my
20 courtroom deputy will provide to you all of the original
21 exhibits. Make sure you both check it. And if there are any
22 disputes as to what is in evidence, I will resolve it when I
23 come back.

24 (Recess)

25

1 (Jury not present)

2 THE COURT: Before we bring in the jury, plaintiff's
3 counsel had two matters he wanted to raise.

4 MR. CABRAL: Yes, your Honor. There is one matter I
5 will address, and I will defer to Mr. Bauer for the second.

6 THE COURT: It has to be quick. If you want to make a
7 lengthy statement, we will wait until after.

8 MR. BAUER: Very quick, your Honor.

9 MR. CABRAL: Your Honor, on Thursday your Honor
10 sustained an objection that was raised by plaintiff on motion
11 in limine number 1 regarding the predetermined URL issue, and
12 the grounds for that was that it was inconsistent with your
13 Markman order. I have the transcript here if you would like to
14 review it, your Honor. During the closing defense counsel made
15 that argument at length. We would ask for a corrective
16 instruction.

17 THE COURT: Why didn't you object then?

18 MR. CABRAL: We didn't want to object during the
19 closing, your Honor.

20 THE COURT: Why not? That is the time to make a
21 correction.

22 MR. CABRAL: Your Honor, out of respect for the
23 process, we decided to raise it at the end.

24 THE COURT: That is not respect for the jury. The
25 time to correct something that is inaccurate, and I want to

1 hear from defense counsel, assuming it is inaccurate, is, as
2 you saw defense counsel do. I didn't sustain his objections,
3 he knew that the time to make the objection was when the
4 plaintiff's counsel stated something that he thought was
5 inaccurate. That's the time to do it.

6 MR. CABRAL: Your Honor, the grounds for the objection
7 that we are raising now, the exception we are raising now is
8 not inaccuracy necessarily. It is that this evidence was
9 specifically excluded by your Honor.

10 THE COURT: That's the same point. Let me hear from
11 defense counsel.

12 MR. EDERER: Mr. Sharifahmadian will argue this.

13 MR. SHARIFAHMADIAN: The objection had been waived,
14 your Honor.

15 THE COURT: No. I may or may not decide that. If
16 that's the best you have, you are not in good shape.

17 MR. SHARIFAHMADIAN: Mr. Ederer's closing referred to
18 what is in the patent. The patent does refer to URL's of the
19 type blender or the URL of the type coffee maker. It is a
20 factual statement about what is stated in the patent. It is no
21 way contrary to anything that your Honor ruled with respect to
22 claim construction in this case. In fact, what is a URL
23 associated with was not construed.

24 THE COURT: I will deal with this after I charge the
25 jury. I don't think it can be dealt with in one second. Let

me hear the other objection.

MR. BAUER: The other one, your Honor, our objection is to keep the evidence out. This was after he made the statement that ADREA couldn't find a qualified expert. That is just inappropriate and wrong.

THE COURT: I noticed you were on the verge of objecting then.

MR. BAUER: It had come out already.

THE COURT: Again, that would have been the time to do it. But I would have overruled that objection. While perhaps not as ideally phrased as it might have been, I think what the jury understood was it was an argument by defense counsel commenting, fairly I think, on the deficiency of the expert who was offered. I think that is totally fair comment. That objection is overruled.

We will deal with the other objection after we charge the jury. Let's bring in the jury.

(Jury present)

THE COURT: Ladies and gentlemen, you each now have a copy of my instructions of law. We are going to read them together now. You have them in writing so you will be able to take them with you into the jury room and use them during your deliberations.

I will mention right at the outset, at the very back of the instructions, in what is called an appendix, are the

actual claims that are involved in this case. While you also have them in Joint Exhibits 1, 2, and 3, which are the entire patents, we have separated out here the specific claims that are the disputed claims, the asserted claims of infringement in this case. That will be there for your convenience.

Also, if you look at the table of contents, you will see it is in four parts. First, there are general instructions. These are instructions that apply not just to this case but to all civil cases pretty much.

Then there is a section called "Liability." That's where you undertake the first two steps of your analysis. The first step is deciding whether or not there is infringement. If there is no infringement, you don't have to go any further. If there is infringement, then you have to decide the issue of validity, whether the infringed claims are nevertheless invalid for the reasons defense argues or are valid instead. If you find that there is infringement, if you find that there is no invalidity, then you would go on to the issue of damages.

The third section in my table of contents is the instructions on damages. "Damages," you will recall, is the legal term for money. The legal profession prefers, of course, not to use a simple word when we can use a more obscure one, so we call them damages.

Finally, there are some concluding instructions about how you fill out your verdict form and things like that.

Let's turn to page 1, the beginning of the instructions.

We are now approaching the most important part of this case, your deliberations. You have heard all of the evidence in the case as well as the final arguments of the lawyers for the parties. Before you retire to deliberate, it is my duty to instruct you as to the law that will govern your deliberations. These are the final and binding instructions, which entirely replace the preliminary instructions I gave you earlier.

As I told you at the start of this case and as you agree, it is your duty to accept my instructions of law and apply them to the facts as you determine them. Regardless of any opinion that you may have as to what the law may be or ought to be, it is your sworn duty to follow the law as I give it to you. Also, if any attorney or other person has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

Because my instructions cover many points, I have provided each of you with a copy of them not only so that you can follow them as I read them to you, but also so that you can have them with you for reference throughout your deliberations.

In listening to them now and reviewing them later, you should not single out any particular instruction as alone stating the law, but you should instead consider my instruction as a whole.

Your duty is to decide the fact issues in the case and arrive, if you can, at a verdict. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences you decide to draw from the facts as you determine them.

In determining the facts, you must rely upon your own recollection of the evidence. To aid your recollection, we will send you all the exhibits at the start of your deliberations. If you need to review particular items of testimony, we can also arrange to provide them to you in transcript or read-back form.

Please remember that none of what the lawyers have said in their opening statements and their closing arguments and their objections or in their questions is evidence, nor is anything I may have said evidence. The evidence before you consists of just three things: The testimony given by witnesses that was received in evidence, the exhibits that were received in evidence, and any stipulations of the parties that were received in evidence.

Testimony consists of the answers that were given by the witnesses to the questions that were permitted either here in court or in the deposition excerpts that were placed in evidence.

1 Please remember that questions, although they may
2 provide the context for answers, are not themselves evidence,
3 only answers are evidence, and you should therefore disregard
4 any question to which I sustained an objection. Also, you may
5 not consider any answer that I directed you to disregard or
6 that I directed be stricken from the record. Likewise, you may
7 not consider anything you heard about the content of any
8 exhibit that was not received nerve.

9 It is the duty of the attorney for each side of the
10 case to object when the other side offers testimony or other
11 evidence that the attorney believes is not properly admissible.
12 Counsel also have the duty to ask the Court to make rulings of
13 law and to request conferences at the side bar out of the
14 hearing of the jury. All of questions of law must be decided
15 be me.

16 You should not show any prejudice against any attorney
17 or party because the attorney objected to the admissibility of
18 evidence or asked for a conference out of the hearing of the
19 jury or asked me for a ruling on the law.

20 Finally, I also ask you to draw no inference from my
21 rulings or from the fact that upon occasion I asked questions
22 of certain witnesses. My rulings were no more than
23 applications of the law, and my questions were only intended
24 for clarification or to expedite matters. You are expressly to
25 understand that I have no opinion as to the verdict you should

render in this case.

You are to perform your duty of finding the facts without bias or prejudice or sympathy as to any party, for all parties are equal under the law. You are to perform your final duty in an attitude of complete fairness and impartiality. You are not to be swayed by rhetoric or emotional appeals.

It must be clear to you that if you were to let prejudice or bias or sympathy interfere with your thinking, there would be a risk that you would not arrive at a true and just verdict. So, do not be guided by anything except clear thinking and calm analysis of the evidence.

As you know, this is a civil case. In order to prevail in a civil case, a party who is making a claim against another party has what we call the burden, which is the burden of proof of establishing each of the essential elements of the claim. There will be two burden of proof standards by which you must weigh the evidence in this case: Preponderance of the evidence and clear and convincing evidence.

Plaintiff here is ADREA LLC. The defendants here are three related companies: Barnes & Noble, Inc., BarnesandNoble.com LLC, and Nook Media LLC. However, for all of your purposes, these parties can be treated as one entity and are therefore referred to here simply as "B&N" or "defendants."

ADREA claims that the defendants infringed one or more

of ADREA's patents. To prevail on this claim, ADREA must prove such infringement by a preponderance of the credible evidence. The credible evidence means such testimony, exhibits, or other evidence that you find worthy of belief.

To establish a claim by a preponderance of the credible evidence means to prove that that claim is more likely true than not true. It does not mean the greater number of witnesses or how much time either side employs in the trial. The phrase refers to the quality of the evidence, its persuasiveness in convincing you of its truth.

If you find that ADREA has proved that defendants infringed one or more of ADREA's patents, then you must also consider whether nonetheless the defendants are not liable because they approved by clear and convincing evidence that the relevant patent is invalid.

Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence. Clear and convincing evidence is proof that establishes in your mind that the proposition at issue is highly probable.

Finally, if you find that the defendants have infringed one or more of ADREA's patents and that the patent is not invalid, you must decide whether the infringement by defendants was willful, which, as I will explain later, means intentional or reckless. If ADREA shows, again by clear and convincing evidence, that B&N's infringement was willful, then

ADREA may be entitled to increased damages from defendants, but the amount will be determined by me and should not concern you in any respect.

In deciding whether a party meets its burden of proof, you may consider both direct evidence and circumstantial evidence. Direct evidence is evidence that proves a fact directly, for example, where a witness testifies as to what he or she saw, heard or observed. That is called direct evidence.

Circumstantial evidence is evidence that tends to prove a fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today, the sun was shining and it is a nice day but the courtroom blinds were drawn and you could not look outside. Then later, as you were sitting here, someone walked in with a dripping well umbrella and soon after somebody else walked in with a dripping-wet raincoat.

On our assumed facts, you cannot look outside the courtroom and you cannot see whether or not it is raining, so you have no direct evidence of that fact. But on the combination of the facts about the umbrella and the raincoat, it would be reasonable for you to infer that it had begun raining.

That is all there is to circumstantial evidence. Using your reason, experience, you will infer from establish facts the existence or nonexistence of some other fact. Please

1 note, however, it is not a matter of speculation or guess; it
2 is a matter of logical inference.

3 The law makes no distinction between direct and
4 circumstantial evidence. Circumstantial evidence is of no less
5 value than direct evidence, and you may consider either or both
6 and may give them such weight as you conclude is warranted.

7 It must be clear to you by now that counsel for the
8 opposing parties are asking you to draw very different
9 conclusions from various factual issues in the case. An
10 important part of that decision will involve making judgments
11 about the testimony of the witnesses you have listened to and
12 observed. In making these judgments, you should carefully
13 scrutinize all the testimony of each witness, the circumstances
14 under which each witness testified, and any other matter in
15 evidence that may help you to decide the truth and the
16 importance of each witness's testimony.

17 Your decision whether or not to believe a witness may
18 depend on how that witness impressed you. How did the witness
19 appear to you? Was the witness candid, frank, and forthright,
20 or did the witness seem to be evasive or suspect in some way?
21 How did the way the witness testified on direct examination
22 compare with how the witness testified on cross-examination?

23 Was the witness consistent or contradictory? Did the
24 witness appear to know what he or she was talking about? Did
25 the witness strike you as someone who was trying to report his

1 or her knowledge accurately? These are the examples of the
2 kind of common-sense questions you should ask yourselves in
3 deciding whether a witness is or is not truthful.

4 How much you choose to believe a witness may also be
5 influenced by the witness's bias. Does the witness have a
6 relationship with any of the parties that may affect how he or
7 she testified? Does the witness have some interest, incentive,
8 loyalty, or motive that might cause him or her to shade the
9 truth? Does the witness have some bias, prejudice, or
10 hostility that may cause the witness to give you something
11 other than a completely accurate account of the facts he or she
12 testified to?

13 You should also consider whether the witness had an
14 opportunity to observe facts he or she testified about and
15 whether the witness's recollection of the fact stands up in
16 light of the other evidence in the case. In other words, what
17 you must try to do in deciding credibility is to size up a
18 person just as you would in any important matter where you are
19 trying to decide if a person is truthful, straightforward, and
20 accurate in his or her recollection.

21 The law permits parties to offer testimony from
22 witnesses who were not involved in the underlying events in the
23 case but who, by education or experience, profess to expertise
24 in a specialized area of knowledge. In this case Ned Barnes,
25 Brian Berg, Clifford Neuman, and Xin Wang were offered as such

1 witnesses.

2 Stephen Magee also testified, but the opinions he
3 offered were subsequently stricken and may not be considered by
4 you in any respect, although the exhibits that were received
5 during his testimony and any nonopinion facts he testified to
6 may be considered.

7 Specialized testimony is presented to you on the
8 theory that someone who is learned in the field may be able to
9 assist you in understanding specialized aspects of the
10 evidence. However, your role in judging credibility and
11 assessing weight applies just as much to these witness as to
12 other witness. When you consider the specialized opinions that
13 were received in evidence in this case, you may give them as
14 much or as little weight as you think they deserved.

15 For example, a specialized witness necessarily bases
16 his or her opinions in part or in whole on what that witness
17 learned from others, and you may conclude that the witness's
18 opinions may be affected by how accurate or a inaccurate that
19 underlying information is.

20 More generally, if you find that the opinions of a
21 specialized witness were not based on sufficient data,
22 education, or experience, or if you should conclude that the
23 trustworthiness or credibility of such a witness is credible,
24 or if the opinion of the witness is outweighed in your judgment
25 by other evidence in the case, then you may, if you wish,

1 disregard the opinions of that witness either entirely or in
2 part.

3 On the other hand, if you find that the specialized
4 witness is credible and that the witness's opinions are based
5 on sufficient data, education, and experience, and that the
6 other evidence does not give you reason to doubt the witness's
7 conclusions, you may, if you wish, rely on that witness's
8 opinions and give them whatever weight you deem appropriate.

9 With these preliminary instructions in mind, we now
10 turn to the specific charges in this case. Plaintiff asserts
11 that defendants have infringed certain claims of three of
12 plaintiff's patents: U.S. patent number 7,298,851, referred to
13 as the '851 patent, which is Joint Exhibit 1 in evidence; U.S.
14 patent number 7,299,501, referred to as the '501 patent, which
15 is Joint Exhibit 2 in evidence; and U.S. patent number
16 7,620,703, referred to as the '703 patent, which is Joint
17 Exhibit 3 admissible evidence.

18 Plaintiff asserts that such infringement extended to
19 eight devices sold by defendants: The Nook classic, also
20 referred to as the Nook 1st Edition, Nook Color, Nook Tablet,
21 Nook Simple Touch, Nook Simple Touch with Glowlight, Nook HD,
22 Nook HD+, and Nook Glowlight. Together these devices will be
23 referred to as the "Nook devices."

24 In order to encourage useful inventions, the laws of
25 the United States give an inventor a temporary monopoly over

his or her invention. This is called a patent. Once it is issued, anyone who during the period of the patent's protection makes uses or sells the patent's invention without the permission of the owner of patent is said to have infringed the patent.

Here ADREA claims that the Nook devices that are made, used, and sold by defendants infringe claim 96 of the '851 patent; claims 7, 8, 9, 18, and 19 of the '501 patent; and claims 1, 2, 3, 13, and 15 of the '703 patent. These claims will be referred to collectively as the "asserted claims."

To make your job easier, I am attaching as an appendix to the written copies of this set of instructions a copy of each of these asserted claims. As you will see, the asserted claims contain both ordinary English words and specialized terms. One of my jobs is to determine before trial the meaning of the specialized terms.

In particular, the Court has already determined the meanings of the following terms. For the '851 patent, the term "electronic book" means an electronic version of textual or graphical information. The term "title" means the actual title assigned by an author to a book or any other designation, including any graphical symbol or icon indicating a particular group, portion, or category of textual information.

For the '501 patent, the term "associating a predetermined amount of time after the electronic book is

stored on the viewer with the electronic book" means associating with the electronic book a predetermined amount of time that begins when the electronic book is stored on the viewer.

For the '703 patent, the term "consumer appliance" means a device that may send or receive information. The term "identifier" means a sequence of bits or characters that identifies a program, device, or system to another program, device, or system. The term "home network" means a collection of interconnected apparatus in and around the home.

As you look at the claims themselves, these definitions will become clearer. Also, please bear in mind that you must be consistent in the meaning you give to the terms of any given claim for purposes of your analysis of both infringement issues and validity issues.

To prove that defendants have infringed a given claim, ADREA must prove by a preponderance of the evidence that the Nook devices made use of each of the elements of that claim. For a claim that covers the so-called method, ADREA must prove that defendants performed all of the steps of that method.

There are two types of infringement relevant to this case, literal infringement and infringement under the doctrine of equivalents. In order to determine whether a Nook device literally infringed any of the claims, you must compare the Nook device to the elements of the claim you are considering.

This means not just looking at the preferred embodiment of that claim but at the language of the claim itself, since every embodiment of a claim is protected.

If the Nook device duplicates every element of a claim, then it literally infringes that claim. This statement is true even if the Nook device includes other elements. If, however, the Nook device fails to duplicate every element of a claim, then it does not infringe that claim.

Even if the Nook devices do not literally infringe a particular element of a claim you are considering, there can still be infringement if the Nook device meets the element under the doctrine of equivalents. This can happen if the product contains an element that you determine is equivalent to the element of a patent claim in the sense that any differences are insubstantial.

ADREA asserts a doctrine of equivalents argument only with respect to the associating element of claims 7, 8, 9, 18, and 19 of the '501 patent.

One way to decide whether the associating element of any of these claims and the allegedly corresponding part of the Nook devices are equivalent is to consider whether the corresponding part of the Nook devices performs substantially the same function in substantially the same way to achieve substantially the same result as the requirement of the claim.

If you find that plaintiff has failed to prove that

the Nook devices infringed any of the asserted claims, you must find the defendants not liable, and your work is over. But if you find the plaintiff has proved that the defendants infringed one or more of the asserted claims, then you must turn to the issue of validity.

Even if the Nook devices infringed one or more of the asserted claims, the defendant would still not be liable if those claims were invalid. The fact that the patents were approved by the U.S. patent office makes the asserted claims presumptively valid, but the defendants may still prove that those claims are invalid if they can establish such invalidity by clear and convincing evidence, that is, by proving that it is highly probable that the claims in question are invalid.

To be valid, a claimed invention must satisfy certain conditions of patentability, of which the two here relevant are novelty and nonobviousness. Specifically, defendants contend that all the asserted claims are invalid because they lack novelty and/or are obvious. If defendants establish one or more of these contentions of invalidity as to a given claim, that claim is invalid.

Let's first consider the issue of lack of novelty. To qualify for a patent, an invention must be new or novel. Defendants argue this all the asserted claims are invalid for lack of novelty because they were anticipated by prior art. "Prior art" is the term for any previously filed patents,

publicly known publications, or products offered for sale that describe the claimed intervention and were filed or published more than one year before the effective filing date of the patent applications here at issue.

In this case the parties are agreed that the effective filing date of the patent applications here at issue was September 21, 1999, for the '851 patent; November 7, 1994, for the '501 patent; and August 10, 2000, for the '703 patent.

The prior patent, product, or publication need not use the same words as any of the asserted claims. However, to find that the assert claim was not novel, you must find that each and every element of that claim was either inherent or expressly disclosed in a single prior invention or in a single prior art reference. You may not combine two or more items of prior art to make out an anticipation.

Let's next discuss the issue of obviousness. Even if an invention is novel in the sense that no one has previously made it, a patent claim is invalid if the invention was obvious, that is, would have been obvious to a person skilled in the relevant field at the time the invention was made. Defendants contend that all the asserted claims were obvious in this sense.

In order to determine whether a claim was obvious, you need to ask yourself: As of September 21, 1999, for the '851 patent; November 7, 1994, for the '501 patent; and August 10,

1 2000, for the '703 patent:

2 First, what was the prior art respecting that claim,
3 that is, what patents, printed publications, and/or products
4 were publicly available prior to the effective filing date that
5 bore on the subject matter of the claim?

6 Second, what were the differences between the claim
7 you are considering and the prior art?

8 Third, given the foregoing, would someone reasonably
9 familiar with the prior art and reasonably skilled in the
10 relevant field have considered the invention embodied in the
11 claim you are considering obvious in view of the prior art?

12 In addition, you must also consider, in evaluating
13 obviousness, objective considerations to the extent they have
14 been the subject of credible evidence that may indicate that
15 the invention was not obvious, such as commercial success,
16 long-felt need, failure of others to make the invention,
17 copying of the invention by others, unexpected results achieved
18 by the invention, and praise of the invention by others in the
19 field.

20 If you find that defendants have infringed one or more
21 valid claims, you must then determine how much money defendants
22 should pay plaintiff in order to reasonably compensate
23 plaintiff for its losses attributable to such infringement.
24 These are called compensatory damages, and plaintiff bears the
25 burden of proving the amount of such damages by a preponderance

of the credible evidence.

Specifically, compensatory damages are the amount of money that the defendants hypothetically would have paid ADREA as a fee or royalty for using ADREA's patent invention in the Nook devices. The first step in calculating the fee is to determine what rate as a percentage or fixed amount per unit of Nook devices sold the parties would have reasonably agreed to in a hypothetical negotiation taking place in November 2009.

In determining the reasonable royalty, you should consider such factors as:

1. Whether the patent holder had an established royalty for the particular invention;

2. The rates paid by defendants for the use of other patents comparable to ADREA's patent;

3. The nature, scope, and term of the license;

4. ADREA's established policy, if any, to maintain its patent monopoly by not licensing others;

5. The commercial relationship between plaintiff and defendants, if any;

6. The effect of selling the patented device on the sales of the products of other defendants;

7. The duration of the patent;

8. The established profitability of the patent made under the patent, its commercial success, and its current popularity;

9. The utility and advantages that the patent features over prior methods and devices;

10. The nature of the patent invention, the character of the commercial embodiment of it as owned and produced by the licensor and the benefit to those who have used the invention;

11. The extent to which the defendant used the invention and any evidence probative of the value of that use;

12. The portion of the realized profit that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risk, or sufficient features or improvement added by the infringer.

You have previously heard these and a few other factors referred to as the Georgia-Pacific factors, but the list I have just given you replaces the earlier list you received. No one factor is dispositive. However, you may also consider any other factor that in your mind would have increased or decreased the royalty the parties would have agreed to acting as normally prudent businesses.

Once you have considered these factors, you then multiply the royalty rate by the corresponding figure in evidence for the number of Nook devices sold during the relevant periods. The result is the reasonable royalty or the amount of compensatory damages ADREA is entitled to.

The relevant periods for purposes of those calculations varies according to the patent you are

considering. For the '851 patent, damages may only be awarded for the period of March 29, 2012, through December 9, 2012. For the '501 and '703 patents, however, damages should run from March 29, 2012, through the date of your verdict.

If you find defendants liable for infringement, there is one last thing you need to determine bearing on damages, which is whether the infringement by defendants was willful. The determination of whether defendants' infringement was willful will not affect the specific amount of compensatory damages that you will assess, which are not intended to punish defendants but simply to compensate plaintiff, but it will aid the Court in determining whether any additional damages must be assessed.

To prove willful infringement, plaintiff must prove by clear and convincing evidence that defendants either actually knew they were infringing plaintiff's patents or, once they were put on notice of plaintiff's patents, recklessly disregarded the fact that their actions constituted an unjustifiably high risk of infringement of that patent.

To determine whether defendants' infringement was willful, you should consider all relevant facts to the extent they are supported by credible evidence, including, for example:

1. Whether or not defendants intentionally copied a product of plaintiff;

2. Whether or not defendants acted in accordance with the standards of commerce or its industry;

3. Whether or not defendants made a good-faith effort to avoid infringing the asserted claims;

4. Whether or not there was a reasonable claim to believe that defendants did not infringe or had a reasonable defense to infringement; and

5. Whether or not defendants tried to cover up any infringement.

You will shortly retire to the jury room to begin your deliberations. As soon as you get to the jury room, please select one of your number as the foreperson to preside over your deliberations and to serve as your spokesperson if you need to communicate with the Court. You will be bringing with you into the jury room a copy of my instructions of law and a verdict form on which to record your verdict. In addition, we will send into the jury room all of the exhibits that were committed into evidence.

Let me pause for a minute, ladies and gentlemen and show you the verdict form. It is a simple two-page document. The first section is about liability. For each patent you have to say whether or not there has been infringement, and if the answer to that is yes, then you have to say whether or not nevertheless the patent was invalid. You will answer in that first section for each patent both the infringement question

and the validity question.

If you find that any patent was infringed and that the patent was not shown to be invalid, then you go on to the second section, which is damages, and you will compute the total of damages and fill that in next to the dollar sign. Then you will also indicate whether or not the infringement was willful or not willful.

Remember, the dollar sign is for compensatory damages. Willfulness is simply so that I can then determine, if there is any finding of damages, whether additional damages should be added. But that is not for you. You just determine whether it is willful or not. Your damage amount is purely compensatory damages, not additional damages.

After you have reached a verdict and filled out the form, your foreperson will sign it, fold it, seal it in this envelope very cleverly marked "Verdict," and that will be brought to me. But I will not open it until you are all back here in the jury room. Then I will open it, and I will ask each one of you is that your verdict after we have read it out. The reason we go through all those technicalities is to be absolutely sure we have your verdict as you have decided it.

Let's go back to the instructions.

If you want any of the testimony, that can be provided either in transcript or read-back form. Please remember that it is not always easy to locate what you might want, so be as

specific as you possibly can be in requesting portions of testimony.

Any of your requests, in fact any communication with the Court, should be made to me in writing signed by your foreperson and given to the marshal, who will be available outside the jury room throughout you are deliberations. After consulting with counsel, I will respond to any question or request you have as promptly as possible, either in writing or by having you return to the courtroom so that I can speak with you in person.

You should not, however, tell me or anyone else how the jury stands on any issue until you have reach your verdict and recorded it on your verdict form.

Each of you must decide the case for yourself after consideration with your fellow jurors of the evidence in the case, and your verdict must be unanimous. In deliberating, bear in mind that while each juror is entitled to his or her opinion, he should exchange views with his or her fellow jurors. That is the very purpose of jury deliberations, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another, and to reach a verdict based solely and wholly on the evidence.

If, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a

1 conscientious view that differs from the others', you are not
2 to yield your view simply because you are outnumbered? On the
3 other hand, you should not hesitate to change or modify an
4 earlier opinion which, after discussion with your fellow
5 jurors, now appears to you erroneous. In short, your verdict
6 must reflect your individual views and it must also be
7 unanimous.

8 This completes my instructions of law.

9 Now a couple of other things. First, I will note for
10 the record that all previous objections to the charge are
11 deemed renewed at this time and the Court's rulings remain as
12 they were.

13 Second, there is one little item, ladies and
14 gentlemen, I am going to take up with counsel that conceivably
15 might lead to a short additional instruction. I'm not sure
16 whether that will happen or not. If it does, we will send that
17 in in a few minutes. If you don't receive anything further,
18 then that's fine, too.

19 Third, after we do that, I'm going to excuse counsel
20 for 45 minutes so they can have their lunch. Any note you send
21 us between now and 2 o'clock we won't respond to until after 2
22 o'clock.

23 Fourth, you can take as little or as long for your
24 deliberations. That is entirely up to you. If, however, you
25 want to sit beyond 5 clock, and there is no need for you to sit

beyond 5 o'clock, but if you want to for any reason, we can make provision for you to sit later. But you have to let us know by 4 o'clock. So, if for any reason you wanted to sit late, 7 o'clock or something like, that just let us know. Otherwise, when you get to 5 o'clock, if you haven't reached a verdict yet, just go home.

Come back tomorrow at 9 o'clock. You will be on time, unlike some people I know. Whoever is your foreperson needs to make sure that you don't start your deliberations again until all nine of you are back.

Unless counsel has anything else, we will swear in the marshal and excuse the jury.

MR. BAUER: Plaintiff has nothing, your Honor.

MR. EDERER: Nothing else, your Honor.

THE COURT: Very good.

(Marshal sworn)

THE CLERK: Jurors, please follow the marshal.

(1:15 p.m., the jury commenced deliberations.)

(Jury not present)

THE COURT: I will note for the record that I have marked one copy of my instructions as Court Exhibit 1, and that will be docketed. Now let's back to the issue that was raised, belatedly, by plaintiff. Yes, sir.

MR. SHARIFAHMADIAN: Your Honor, the term "URL associated with" has not been construed by this Court. The

1 other day your Honor made a ruling that an expert witness on
2 the stand could not testify that in his opinion "URL
3 associated" means that it has to be of a type. Nevertheless,
4 there has never been a request, much less an order, that B&N is
5 not entitled to put forward a defense with respect to this
6 limitation.

7 Mr. Ederer's closing pointed out the fact that the
8 patent does make references to URL for a particular type of
9 consumer appliance, for example, URL of the type blender. That
10 is a factual statement. Moreover, it is something that the
11 jury can consider and rely on when reaching its own decision in
12 terms of what the common and ordinary meaning of "associated
13 with" is. For that reason, there is nothing improper about
14 making a factual statement about what is in the patent.

15 That's what Mr. Ederer said, the patent makes these
16 types of references. He didn't say that's what the claim
17 means. For that reason we don't believe that there is any need
18 for a special instruction. And any such instruction at this
19 point would be essentially new claim construction when your
20 Honor refused during the claim construction process to construe
21 these terms and said that the jury is entitled to apply the
22 common and ordinary meaning.

23 THE COURT: Counsel.

24 MR. CABRAL: Thank you, your Honor. On Thursday you
25 sustained the objection to exclude evidence on this issue.

1 What you said was, "I think this is really a disguised way
2 around my ruling." What your ruling says is, "B&N proposes
3 adding the modifier 'particular' before 'a consumer appliance,'
4 but that would inappropriately rewrite the claim language."

5 That's exactly what this issue is. They are trying to
6 say they don't infringe this particular claim element because
7 the URL is not associated with a particular device, which is
8 why you saw on that slide references to iPads and all these
9 other things, laptop computers. That is the basis of the
10 defense.

11 In our view, that is inconsistent with the Court's
12 ruling. And you precluded their expert from testifying on this
13 exact issue for the same exact reason. That is why we ask that
14 it be excluded.

15 With regard to Mr. Sharifahmadian's point, the motion
16 in limine number 1 sought to exclude evidence and arguments on
17 this issue. We have already excluded the evidence. Now we are
18 trying to exclude the arguments.

19 THE COURT: I'm troubled by this. Here is what I
20 want. First, I want, with the help of the court reporter, to
21 see exactly what defense counsel said about this on summation.
22 After we break in a minute, counsel should work with him to
23 print out that and get me one copy of that, which you can then
24 give to my courtroom deputy, who will bring it down to me.

25 Secondly, plaintiff's counsel should then, assuming I

1 agree with their theory arguendo, draft an instruction that I
2 would give to the jury on this point. That instruction has to
3 be short. I think it has to be short for three different
4 reasons.

5 First, because all good instructions are short.

6 Second, because -- and here is where I don't think it
7 is a question of waiver but not irrelevant that no objection
8 was made at the time -- if an objection had been made at the
9 time, I could have dealt with this right then and there and it
10 either would have been corrected quickly in front of the jury
11 or not, as the case may be, depending on how I ruled. Now it
12 takes on an arguable significance that is out of proportion to
13 what would have been the case if there had been objection right
14 at the time. The best way to balance these competing
15 interests, therefore, is to keep the instruction short.

16 Thirdly, to be frank, on my view of the evidence, the
17 jury is not going to spend one minute on this issue in any
18 event. My apologies to defense counsel for thinking this is
19 not his winning argument. I think this will not prove to be
20 material when all is said. But that is just a guess. I don't
21 know what goes on in the jury's mind, and therefore we have to
22 make sure they know what the proper arguments are.

23 You can do that in handwriting, by the way. You don't
24 need to go find, although you may have something here,
25 something to print it out. Show it to your adversary. Defense

counsel, I have your arguments, but if you have specific objections to the wording of the proposed instructions, take a copy of it and mark it up. My courtroom deputy can photocopy whatever they put together. Mark it up.

I'm coming back to the courtroom at 2 o'clock to hear that other Barnes & Noble case with different counsel. My gosh, I was surprised I didn't hear this in defense counsel's summation, that Barnes & Noble's real reason for fighting this and every other case is because of their well-known belief that the legal community is underemployed and needs a stimulus, which it is clearly getting. In any event, when I come back at 2 o'clock, I'll make a ruling after having reviewed these materials.

Yes?

MR. SHARIFAHMADIAN: Very shortly, your Honor, and just in the interests of it not getting lost in the shuffle, we want to note that Barnes & Noble still has a 101 defense with respect to the '501 patent and a 112 defense with respect to the '851 patent. Those are issues for your Honor that can be addressed at the appropriate time. We just wanted to put that on the record.

THE COURT: Yes, that's right. There is the declaratory judgment claims. Of course, I am looking forward to them. Do you think, what, two months of hearing on that should be sufficient? I'll see what the schedule is.

1 We will see you at 2 o'clock. My courtroom deputy is
2 available. If she is not here in the courtroom, just knock
3 loudly on the door.

4 (Luncheon recess)

1 AFTERNOON SESSION

2 2:20 p.m.

3 (Jury not present)

4 THE COURT: So, first of all, I forgot to mention this
5 morning, and let me note for the record, that last night I
6 received excellent submissions from both sides on the somewhat
7 close question of the duration of damages. I decided in favor
8 of defendants' position, but I do want to acknowledge that it's
9 a close call. If it becomes not mooted by the jury's verdict,
10 I will write a short opinion setting forth the reasons for my
11 determination so that any reviewing court will have the benefit
12 of a more elaborate discussion.

13 Secondly, with respect to the issue that was raised by
14 plaintiff's counsel after summations, I don't think any further
15 instruction is necessary, and I don't think what defense
16 counsel said violated any previous ruling.

17 Let's go back to the original source of all this,
18 which is the ruling from this Court in the Markman hearing. As
19 I said in my Markman opinion at page 8, "The terms 'a
20 predetermined URL associated with a consumer appliance' and 'an
21 identifier associated with a consumer appliance' require no
22 further construction. B&N proposes adding the modifier
23 'particular' before 'consumer appliance,' but that would
24 inappropriately rewrite the claim language."

25 Now, I mention this because there was no ruling

1 relating to a particular URL, which was the point that
2 plaintiff's counsel was referring to at the various sidebars we
3 had, for example, during Mr. Neuman's testimony. But even
4 aside from all that, the exact language of defense counsel's
5 summation that's in dispute here, and now I am reading from the
6 excerpt from the summation provided by our court reporter is,
7 "So, unlike the patent, where there is a URL for type blender
8 and a URL for the type garbage can, there is no URL for the
9 Nook devices."

10 So the argument wasn't anything about that there has
11 to be a particular predetermined URL associated with the Nook
12 device; it was that here there was no URL, and therefore there
13 was no infringement. I think that's a different argument, not
14 one precluded by any of my prior rulings, and so I think no
15 further instruction is necessary.

16 All right. So here is the drill in terms of while the
17 jury is out. I want at least one attorney authorized to
18 respond to any note from the jury present on this floor at all
19 times. You can be in the courtroom, you can be outside the
20 hallway, but not on any other floor and not otherwise. Because
21 when a note comes in, I want to be able to immediately respond
22 to it and not to go searching or waiting for counsel to appear.
23 But we don't need all lawyers; we just need one authorized
24 lawyer from each side.

25 At 5:00, unless the jury asks to sit later, you can

1 all just automatically go home. You should be back here at 9
2 a.m. and I will be back in as timely fashion as always.

3 Now, I haven't told this to the jury, but at 1:00
4 tomorrow, or maybe about 1:30, I have to leave to go to Detroit
5 to appear at a program before Wayne State Law School. I of
6 course scheduled this when I was quite sure that Detroit was
7 going to be in the World Series and little did I know.

8 Assuming the jury has not reached a verdict by that
9 time, I can deal with any and all notes by e-mail or by
10 telephone. Even when I am up in the air, these days you can
11 get Internet access. And I will arrange with one of my fellow
12 judges to take the verdict if I am still away when the verdict
13 comes in. Frankly, I am modestly confidently that we will have
14 a verdict before I leave, but I don't know that, obviously, and
15 I did not want to put any pressure on the jury by telling them
16 I would be leaving so they would have as much time as they
17 needed.

18 So, if you folks will go to the back, I need to hear
19 argument on another case.

20 (Recess pending verdict)

21 (Jury not present; time noted: 3:40 p.m.)

22 THE COURT: We have a note, which I will have my
23 deputy mark as Court Exhibit 2 since number 1 was the charge,
24 and it reads as follows:

25 "If one claim is infringed, is that sufficient for the

1 patent to be considered infringed? EG, if we find that claim 7
2 of '501 is infringed, do we need to consider claim 18 also, or
3 can we not consider claim 18 at all once we find infringement
4 for claim number 7?" And it's signed by the foreperson, but I
5 can't read his or her name, so it will remain a mystery, at
6 least for the moment as to who the foreperson is. You guys can
7 figure it out.

8 I should note for the record both counsel have
9 received copies of the note.

10 Let me hear from counsel as to what you propose we
11 respond?

12 I am told the foreperson is James Hoffnagle, Juror No.
13 8.

14 So plaintiff.

15 MR. CABRAL: Our position would be that one claim is
16 sufficient for infringement.

17 THE COURT: So the answer to the question would be
18 yes.

19 MR. CABRAL: I believe so, your Honor.

20 THE COURT: Defense counsel?

21 MR. BERTA: Your Honor, our position would be that in
22 order to have a record for appeal, because claim 7 and claim
23 18, one is a method and the other one is a device, it would be
24 important to have a finding on each claim.

25 THE COURT: You have indicated previously at the time

1 of the verdict form that that was your preference, and I
2 indicated why I was not inclined to go that route, and as
3 always, this is a good example. I understand for appellate
4 purposes, and plaintiffs take their chances since they haven't
5 asked for that, but the other side of it is that it makes the
6 jury able to proceed in an efficient manner.

7 So on the merits, putting aside your request for a
8 more particularized verdict, do you agree that the right answer
9 to the question is yes?

10 MR. BERTA: Yes. Setting aside the objection to the
11 verdict form, I believe that the answer has to be yes because
12 that's consistent with the verdict form.

13 THE COURT: I agree. So let me write something here.

14 (Pause)

15 THE COURT: My law clerk points out that there is one
16 exception. So let me read this to you and see if there is any
17 objection to the following note.

18 To the jury: In answer to your question, the answer
19 is yes. If one claim is infringed, that is sufficient for the
20 patent to be infringed.

21 However, if the claim that you found infringed you
22 later determine to be invalid, you would then have to go back
23 and determine whether any other claim of that patent was
24 infringed.

25 Yes?

1 MR. BERTA: Yes, your Honor.

2 THE COURT: Very good.

3 So I will have my courtroom deputy make a copy of this
4 note and mark the copy as Court Exhibit 3, and we will send the
5 original in to the jury room.

6 Very good. Stay tuned.

7 (Recess pending verdict)

8 (Jury not present; time noted: 4:55 p.m.)

9 THE COURT: We have received another note.

10 I will give the previous note to my courtroom deputy
11 to mark as Court Exhibit 2. My response to that was Court
12 Exhibit 3. So this will be Court Exhibit 4 received at 4:45
13 p.m. You all have copies of it.

14 "Can we get the following: Testimony on from Narain
15 on '501 patent plus slides. Testimony from Neuman on '501
16 patent and slides. Testimony from Berg on '501 patent plus
17 slides."

18 So I think the clear answer is they can get the
19 testimony, not the slides; the slides were not evidence.

20 Anyone disagree?

21 MR. BERTA: No, your Honor.

22 MR. CABRAL: No, your Honor.

23 THE COURT: They are about to leave, so rather than
24 try to write them a note I will just bring them in, and I will
25 excuse them for the day and tell them that we will get them the

1 testimony overnight, and they will have it first thing in the
2 morning.

3 (Jury present; time noted: 4:56 p.m.)

4 THE COURT: So, ladies and gentlemen, thank you for
5 your latest note. I wanted to let you know, not only for this
6 note but also for any future reference, that we will get you
7 the testimony, in fact, it will be ready for you for when you
8 come back tomorrow morning, but we can't give you the slides
9 because they were never in evidence. They were presented as an
10 aid in following the testimony that was given, but under the
11 law, when you're deliberating, we can only send in evidence, we
12 can't send in something that was not evidence.

13 So I know it breaks your heart to end your
14 deliberations today five minutes early but, nevertheless, you
15 are excused. Please be back in the jury room at 9 a.m. and you
16 should just start deliberating once your foreperson has made
17 sure that all nine persons are here.

18 We will see you tomorrow morning.

19 (Jury exits courtroom)

20 THE COURT: So here is the story in preparing the
21 testimony.

22 Counsel, I think you all had daily copy, yes? Check
23 with the court reporter to make sure there is nothing that has
24 been changed, typographical errors or anything like that.
25 Assuming you have the final, then agree among yourselves as to

1 what testimony should go in. If there is any disagreement, and
2 I really hope there isn't, but if there is any disagreement,
3 send me, so my law clerk, an e-mail this evening no later than
4 8 p.m. I teach at Columbia, but my class is finished at about
5 8:15 and I will take a look at it then and resolve it by e-mail
6 either tonight or early tomorrow well before 9 a.m.

7 Assuming you're in agreement, make nine copies of it
8 tonight. If you're in disagreement, you will have to make
9 those copies early tomorrow morning. The way I usually do
10 this, if a note like this comes during the day, is we send in
11 one copy immediately and then make the eight other copies so we
12 don't delay things, but since we have overnight we might as
13 well make the nine copies if we can.

14 So, assuming there is agreement, then just give the
15 nine copies, at or before 9 a.m., to my courtroom deputy, who
16 will bring them into the jury room or give them to the marshal
17 to take into the jury room. If there is disagreement, as I
18 say, I will resolve that by e-mail early tomorrow morning at
19 latest. Then make the nine copies, and again, then just give
20 them to my courtroom deputy who will take them in.

21 Yes, sir.

22 MR. SHARIFAHMADIAN: Mr. Narain's testimony was read
23 in or was on video, and I don't believe it was transcribed by
24 the court reporters. Would you like the video?

25 THE COURT: Unless counsel disagree, I think it would

1 be not prudent to bring them back here to just look at it. I
2 think they want to study it. So if you have a transcript, just
3 make the transcript in accordance with what was played in court
4 and that will be fine.

5 By the way, it is not necessary, and it will save you
6 a lot of time because it is not necessary, to take out
7 objections and all like that. The jury has been fully informed
8 to disregard any testimony to which an objection was sustained,
9 etc., etc. If you want to spend the time doing that, I am not
10 going to stop you, but it's certainly not necessary. That
11 applies also to the depositions where, as I noticed when I was
12 going through them, every third question was objected to.

13 MR. BERTA: May I ask one question?

14 THE COURT: Yes.

15 MR. BERTA: I think it's implicit from the note that
16 this is with respect to infringement and the Nook device, but
17 it's not expressed.

18 THE COURT: Anything that relates to the '501 patent
19 we are going to have to send them.

20 MR. BERTA: That would include invalidity?

21 THE COURT: If you have disagreements on that, but I
22 think it includes everything. That's invalidity, infringement,
23 you name it, anything that deals with the '501 patent. My
24 general rule is to err on the side of inclusion; better they
25 should have more than less. If they ask a very, very specific

1 question, that's a different story.

2 Anything else? We will see you tomorrow morning.

3 (Adjourned to October 23, 2014, at 9:00 a.m.)

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